

**A Review of
the Copyright Licensing
Regimes Covering
Retransmission of Broadcast
Signals**

**Appendix I
Initial Comment Letters
RM-97-1**



U.S. Copyright Office

August 1, 1997

A Report of the Register of Copyrights

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98-012646 AB

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A Report of the Register of Copyrights

For sale by the U.S. Government Printing Office
Superintendent of Documents, Mail Stop: SSOP, Washington, DC 20402-9328
Vol. I ISBN 0-16-049203-3
Vol. II ISBN 0-16-049204-1
Vol. III ISBN 0-16-049205-X
Set ISBN 0-16-049206-8

INITIAL COMMENT LETTERS (RM-97-1)
(Public Hearings Concerning the Revision of the
Cable and Satellite Carrier Compulsory Licenses)

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NOTICE OF PUBLIC MEETINGS AND REQUEST FOR COMMENTS

REVISION OF THE CABLE AND SATELLITE CARRIER COMPULSORY LICENSES; PUBLIC MEETINGS

The following excerpt is taken from Volume 62, Number 54 of the *Federal Register* for Thursday, March 20, 1997 (pp. 13396-13400)

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 97-1]

Revision of the Cable and Satellite Carrier Compulsory Licenses; Public Meetings

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of public meetings and request for comments.

SUMMARY: The Copyright Office, at the request of the Chairman of the Senate Judiciary Committee, is examining the copyright licensing of broadcast retransmissions for the purpose of recommending legislative changes to the Congress. The Office is announcing public meetings, and identifying issues for discussion, for the purpose of taking testimony from interested persons. This Notice describes the schedule and structure for the public meetings.

EFFECTIVE DATE: Public meetings will be held from May 6, 1997, through May 9, 1997, in the CARP Hearing Room, LM 414, James Madison Memorial Building, 101 Independence Avenue, S.E., Washington, D.C. 20540.

TIMES: Each daily session will begin at 10 a.m. Persons wishing to testify should notify the Copyright Office in writing no later than close of business on April 15, 1997. Notices of intent to testify should be addressed to William Roberts, Senior Attorney, and may be sent by mail or by telefacsimile. The Office will notify each

person expressing an intention to testify of the expected date and time of his/her testimony.

WRITTEN STATEMENTS AND REPLY COMMENTS

Each person wishing to testify must submit a formal written statement of his/her testimony no later than the close of business on April 18, 1997. Written statements will also be accepted from parties who do not wish to testify. Summaries of the formal written testimony, for purposes of oral testimony, may be submitted on the date of testimony. In addition, interested parties may submit written questions, for possible use by panel members of the Copyright Office during the course of meetings, no later than close of business on April 18, 1997.

After the close of the meetings, interested parties may submit written reply comments to the testimony offered at the meetings, including any proposed legislative amendments, no later than close of business on June 3, 1997.

ADDRESSES: If delivered by hand, fifteen copies of written statements, questions, and reply comments should be brought to: Office of the General Counsel, Copyright Office, James Madison Memorial Building, Room LM-403, First and Independence Avenue, S.E., Washington, D.C. 20540. If sent by mail, fifteen copies of written statements, questions, and comments should be sent addressed to Nanette Petruzzelli, Acting General Counsel, Copyright GC\I&R, P.O. Box 70400, Southwest Station, Washington, D.C. 20024

FOR FURTHER INFORMATION

CONTACT: Nanette Petruzzelli, Acting General Counsel, or William Roberts, Senior Attorney for Compulsory Licenses. Telephone (202) 707 8380. Telefax: (202) 707-8366.

SUPPLEMENTARY INFORMATION:

Background

On February 6, 1997, Senator Orrin Hatch, Chairman of the Committee on the Judiciary, United States Senate, sent a letter to the Register of Copyrights requesting the Copyright Office to conduct a global review of the copyright licensing regimes governing the retransmission of over-the-air broadcast signals. Senator Hatch requested the Office to report its findings to the Committee by May 1, 1997, and to develop policy options and legislative recommendations. The reporting date has now been extended, at the request of the Office, to August 1, 1997.

In making his request, Senator Hatch identified several issues regarding the copyright implications of broadcast retransmissions which warrant consideration. Specifically, these include extension of the compulsory copyright license created by the Satellite Home Viewer Acts of 1988 and 1994, and the disputes surrounding the implementation of that compulsory license and the so called "white area" restriction for the retransmission of television network stations. Additionally, Senator Hatch asked the Office to consider possible harmonization of the cable and satellite carrier compulsory licenses of the Copyright Act, and the extension of those licenses to new technologies such



as local retransmission of broadcast signals by satellite, retransmission of broadcast signals over the Internet and by the telephone companies, and new markets for public television.

In discharging its task and making its report, Senator Hatch has encouraged the Copyright Office to conduct open public meetings to hear from interested parties and promote discussion in the hopes of establishing consensus solutions to these issues. Consequently, the Office is publishing this Notice to inform interested parties of the time and structure of such meetings, and how the Office plans to accomplish its task of reporting to the Senate Judiciary Committee.

Public Meetings

Because both the cable and satellite carrier compulsory licenses implicate and affect the existence and profitability of a number of industries, the Copyright Office believes that input from these affected industries is critical to a complete report to the Congress. Consequently, the Office has determined that a process involving both written comments and open meetings is essential to gathering the necessary information. We are, therefore, announcing the following schedule.

The Office will conduct public meetings with interested parties in the CARP Hearing Room at the Copyright Office beginning on May 6, 1997, and running through the end of that week, if necessary. The format for these meetings will resemble the traditional Congressional hearing model in that there will be panels of witnesses that will present testimony to a panel of Copyright Office staff, headed by the Register of Copyrights. The Register and Office staff will ask questions of the various persons who testify, and interested parties may submit written questions to the Office by April 18, 1997, which may be addressed to specific witnesses, or the witnesses as a whole. There are no guarantees that the Office will ask every written question that is submitted.

The public meetings are open to anyone. However, in order to testify, interested persons must inform the Office of their intention to testify no later than the close of business on April 15, 1997. Notification of intention to testify must be in written form, either by letter or notice, and must be in the possession of the Office by the close of business on April 15. Because of time constraints, and the need for the Office to schedule the panels of witnesses as soon as possible, it is recommended that persons wishing to testify deliver their

notification by hand or facsimile transmission by the deadline. Notifications received after the April 15 deadline will not be accepted, and such person or persons will not be allowed to testify.

The public meetings will begin at 10 a.m. each morning, and will continue until 5 p.m., unless otherwise directed by the Register of Copyrights. The Office will notify each witness who has filed a timely notice of intention to testify several days in advance of the date he/she is expected to appear and offer testimony. The Office will also notify each witness of the other witnesses who will appear on his/her panel. Because of space limitations in the CARP Hearing Room, witnesses are encouraged to appear only on the date they are scheduled to offer testimony.

Witnesses may bring with them on the day of their testimony a written summary of their oral testimony. Witnesses who bring such written summaries are asked to provide fifteen copies of the written summaries for use by the Office and others in attendance at the meeting.

Transcription services of the public meetings will be provided by the Copyright Office. Those parties interested in obtaining transcripts of the meetings will need to purchase them from the transcription service.

Written Statements

All persons who notify the Copyright Office of their intention to testify must submit a written statement of their testimony by the April 18, 1997, deadline. Because of time limitations, the Office encourages parties submitting written statements to deliver them to the Office by hand or by overnight express mail on or before the April 18 deadline. Telefacsimile transmissions of written statements will not be accepted.

Parties submitting written statements are encouraged to include any and all information that they consider relevant to the copyright licensing of broadcast retransmissions. Parties may also include any exhibits that they deem relevant. Fifteen copies of each written statement must be submitted by the deadline.

There is no prescribed format for the written statements. Parties are encouraged to organize their testimony in as clear and readable form as possible, and to provide a glossary of technical terms used in the written statement.

Parties who do not wish to appear at the public meetings are nonetheless permitted, and encouraged, to submit

written statements by the April 18 deadline.

Reply Comments

After the close of the public meetings, interested parties may submit comments in reply to the written statements and oral testimony. The reply phase is open to all parties, and is not limited to those who testified at the meetings and/or submitted written statements. As with the written statements, reply comments must be in the possession of the Copyright Office by the June 3, 1997, deadline. No facsimile transmissions of reply comments will be accepted.

There is no format for reply comments, beyond the principles of clarity and a glossary of technical terms. Parties are also encouraged to offer any legislative proposals and/or amendments that they have at that time.

Scope of the Proceeding

As Senator Hatch's letter makes clear, the Copyright Office will be conducting a global review of copyright licensing for the retransmission of broadcast signals, and in particular the cable and satellite carrier compulsory licenses. The Office will be confining its report to issues related to the retransmission of over-the-air broadcast signals. The Office will not be considering other matters, such as music licensing for television, the section 114 compulsory license for digital subscription transmission services, operation or administration of the Copyright Arbitration Royalty Panels, or matters of copyright liability for on-line service providers on the Internet.

While the Office's report is confined to the retransmission of broadcast signals, this does not mean that the Office will focus solely on the cable and satellite carrier compulsory licenses as they currently exist. Rather, all matters involving copyright licensing of broadcast retransmissions will be considered, including basic questions such as whether there remains a need for compulsory licenses or whether new compulsory licenses should be added to the Copyright Act. More specifically, are compulsory licenses still justified? Perpetually? Or, can they be phased out? If compulsory licenses are justified, are the present configuration and present provisions fair and equitable? Or, should adjustments be made? If so, what should the changes be? Should the existing licenses be combined into one new license? Should new uses or services be combined in it? Or, should new uses and services be subject to separate and distinct licenses.

In filing their written statements and offering oral testimony, the parties are

encouraged to address any and all matters related to copyright licensing of broadcast retransmissions which they believe are relevant and important. In order to identify as many issues as possible from the outset, so as to permit full discussion, the Copyright Office met informally with representatives of the major industries affected by copyright licensing of broadcast retransmissions. Representatives included copyright owners of broadcast programming, cable and satellite carriers, broadcasters, the Public Broadcasting Service, and telephone companies. The purpose of these meetings was not to discuss policy or what the law should look like, but to identify the relevant issues.

The Office welcomes discussion of any matters related to copyright licensing of broadcast retransmissions that interested parties deem important. The Office is, however, raising a number of issues below, identified during the course of its informal meetings, which we believe deserve attention during the course of the public meetings. We encourage interested parties to provide any and all information and opinions regarding these issues in both their written statements and oral testimony.

A. Basic principles

1. Need for compulsory licenses.

As noted above, the fundamental principles of copyright licensing of broadcast retransmissions are part of this review. The cable industry has enjoyed a compulsory license for its broadcast retransmission since January 1, 1978, and the satellite industry has had a similar license since 1988. Do the conditions that warranted creation of those licenses continue, or have circumstances changed such that the need and/or configuration of those licenses should be altered? Is there a continuing need for the cable and satellite licenses, or should cable and/or satellite carriers be required to negotiate the licensing of broadcast programming in the free marketplace?

2. Expansion and revision of compulsory licenses. In the alternative, should the compulsory licensing scheme of the Copyright Act be expanded? Should new types of broadcast retransmission services, such as open video systems provided by telephone companies and retransmission services via the Internet, have their own separate compulsory licenses? Or, is it better to place these services in the existing compulsory license structure? How could this be achieved?

Furthermore, assuming that a compulsory licensing scheme should remain for broadcast retransmissions, should the cable and satellite licenses be

unified into a single compulsory license applicable to all retransmission providers? What are the practical barriers to such a single license? What are the advantages and disadvantages?

If the cable and satellite carrier compulsory licenses remain separate, should the royalty rates paid under both licenses be equalized? Should this be done in the statute, or should the criteria for adjusting royalty rates be made the same for both licenses? Should the standard be the fair market value of the copyrighted works, or are there other or additional criteria that should be used?

3. Must-carry. An important element of the structure of the cable compulsory license in 1976, and today, is the must-carry regulation of broadcast signals by the Federal Communications Commission. Must-carry regulation was reimposed by Congress in the 1992 Cable Act after it had been eliminated by the courts in the mid-1980's, and the constitutionality of the new must-carry regime is currently on appeal to the United States Supreme Court. The Copyright Office is aware that the outcome of that case has a direct impact on how broadcasters, and copyright owners, view the copyright licensing of broadcast retransmissions. Recognizing that the current appeal may not be the final word on must-carry (the Supreme Court could, for instance, find the concept of must carry to be constitutional but then find fault with the current must-carry rules), what impact might the Court's decision have on the current compulsory licensing scheme? If the Court upholds must-carry, should must-carry be extended to the satellite carrier compulsory license and the provision of local network signals, as well as all other broadcast retransmission services seeking compulsory licensing? If the Court strikes down must-carry in whole or in part, as unconstitutional how should that affect a revised compulsory license scheme for broadcast retransmissions?

B. Cable compulsory license

1. Cable regulation and rates. The cable compulsory license, created in 1976, represents a number of compromises and requirements necessitated by the technological and regulatory framework in existence at that time. Since 1976, the cable industry has grown considerably, and the marketplace has changed. The license is based upon a regulatory structure of the Federal Communications Commission that has not been in existence for a number of years. Should the cable compulsory license be reformed to reflect the current marketplace and regulatory framework? Should the royalty payment scheme of

the license, based upon each cable system's gross receipts for the retransmission of broadcast signals, be simplified so as to remove reliance upon outdated FCC rules? Is the per subscriber, per signal charge of the satellite carrier license an appropriate solution? If not, why not? Are there other solutions? Also, should the payout of royalties collected under the cable license be broadened to include compensation for network programming as well as nonnetwork programming?

In addition to regulatory changes, the cable industry has experienced considerable marketplace change. The FCC's examination of the state of the cable industry in the last several years demonstrates that the cable industry has become far more concentrated and integrated. Should the cable compulsory license be amended to reflect the significant amount of mergers and acquisitions in the cable industry? If so, in what ways?

2. Radio retransmissions.

Retransmission of broadcast signals under the cable license includes both television and radio. The FCC is beginning its process of authorizing over the-air digital radio services. Does the cable license need to be amended to accommodate retransmission of these services, and should all broadcast retransmission services be allowed to carry radio as well as television broadcast signals?

3. New retransmission providers.

In recent years, a number of new retransmission providers outside the ambit of traditional cable systems have sought inclusion in the cable compulsory license. These have included satellite carriers, wireless cable operators (which successfully sought statutory inclusion in 1994) and telephone companies providing broadcast retransmissions on video dialtone and open video system platforms. Is it appropriate to include these services, and other newcomers such as broadcast retransmissions via the Internet, within the cable compulsory license? If so, does the license require amendment to accommodate these operators, and in what fashion? Does the passive carrier exemption of 17 U.S.C. 111(a)(3) require amendment to accommodate these services? How can the cable license be amended so that all users of the license are in parity with one another in terms of the signals that they are permitted to provide and the royalty amounts they pay for those signals? Should there be economic and/or regulatory caps on the number of distant broadcast signals that may be carried, or should all signals be paid for at the same rates?

Finally, should the existence of the cable compulsory license continue in perpetuity, or should the license be phased-out after some period of time? Or, in the alternative, should the license be made periodic so that it is subject to renewal every certain number of years, such as the satellite carrier compulsory license?

C. Satellite Carrier Compulsory License

1. White area restriction. One of the major motivating factors for requesting the Copyright Office to consider the compulsory licensing scheme for broadcast retransmissions consists of certain problems that have arisen in the operation of the satellite carrier compulsory license. This is especially so since the license is slated to expire at the end of 1999, and Congress will need to consider whether it should be extended, and if so, under what conditions. Specifically, much of the controversy has centered on the network territorial provisions of the Satellite Home Viewer Act, commonly known as the "white area" restriction. The current satellite carrier license does not allow satellite carriers to make use of the license for network signals for subscribers who do not reside in unserved households. An "unserved household" is defined as one that cannot receive a signal of grade B intensity, using a conventional rooftop antenna, from the local network affiliate, and has not received the local network affiliate through a subscription to cable services within the previous ninety days.

Is the white area restriction of the satellite license still necessary, or should satellite carriers be permitted to provide network signals to all their subscribers? Should the white area restriction remain in place for satellite carriers who wish to provide a subscriber with a distant network affiliate, but not apply to satellite carriers who provide retransmission of local network affiliates to their subscribers? If so, how should a local network affiliate be defined? Should a satellite carrier be permitted to provide retransmission of a network affiliate to subscribers who reside within the Designated Market Area of the affiliate, or is there a better way to determine local area?

There are a number of other issues surrounding the white area restriction. The purpose of the restriction is to allow network broadcasters to preserve the exclusivity of their programming in their market. Is it now possible, and appropriate, to impose exclusivity protection upon satellite carriers through

FCC regulation (syndicated exclusivity and network non duplication) rather than through the copyright statute? If the white area restriction remains, is the grade B signal intensity still an appropriate measure? Should another standard be adopted, such as picture quality? If picture quality is appropriate, how can that be enforced as a legal standard for determining copyright infringement? How can subscribers who cannot have a conventional rooftop antenna receive network signals from their satellite carrier? Likewise, can persons who reside and travel in mobile homes receive network service? What is the justification for the 90 day waiting period from any subscription to a cable system that provides the signal of a primary network station affiliated with that network, and should that provision be eliminated from the statute?

A possible solution to difficulties surrounding the white area provision is an adjustment in royalty rates designed to compensate local network affiliate broadcasters for the loss of viewership to distant network signals. In essence, subscribers who reside within the service area of a network affiliate, and desire to receive the signal of a distant network affiliate, can pay a surcharge for the privilege of receiving that distant network affiliate. The monies generated by the surcharge would be paid to the network affiliates. Is this a viable option and, if so, how should the surcharge monies be collected and who should administer their payment?

Finally, with respect to satellite subscribers who have their service of network signals disconnected due to the white area restriction, what means of redress can they be afforded to determine that termination of their service was accurate and required? Can the subscriber require that either the satellite carrier terminating service, or the network affiliate challenging service, conduct a test at his/her household to determine if he/she is eligible for network service? Who should pay for such test and how should it be administered? What should be the appropriate standards of the test? If a test is created, should subscribers who currently receive network signals be grandfathered in their receipt of those signals? Should the matter of a subscriber's eligibility to receive network service from a satellite carrier be a matter of private determination between broadcasters and satellite carriers, or should a government agency make the determination?

Another area of recent interest is the enforcement of the white area restriction. If such a restriction

continues, how can it be more economically and efficiently enforced? Are there better ways to identify which subscribers may receive network signals under the satellite license, and those who are not eligible? Should the remedies for copyright infringement be amended to provide for additional and/or different remedies for violations of the white area restriction?

2. Other issues. Aside from the white area restriction, other areas of the satellite carrier compulsory license warrant consideration. Network signals are currently paid for at a lower royalty rate than superstation signals. Should the disparity be eliminated, so that all signals are paid for at the same rate? Should there be special provision for retransmission or transmission of a national satellite feed of the Public Broadcasting Service and a separate royalty rate for this signal? What should the rate or rates be?

The satellite carrier license will expire at the end of 1999. Should the license be extended on a permanent basis, or is temporary extension still an appropriate solution? If an extension is temporary, what mechanisms can be put into place to encourage a smooth and efficient transition into a free marketplace system? Is collective administration of copyrighted broadcast programming an appropriate solution, and, if so, who should administer such a system?

The Copyright Office welcomes and encourages response and discussion of these issues, as well as any other related matters interested parties deem relevant and important.

DATED: March 17, 1997

Marybeth Peters,
Register of Copyrights

[FR Doc. 97-7091 Filed 3-17-97; 2:51 pm]

[BILLING CODE: 1410-33-P]

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□ ALSO ADMITTED IN DISTRICT OF COLUMBIA
* ALSO ADMITTED IN FLORIDA
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* ALSO ADMITTED IN WEST VIRGINIA
* ONLY ADMITTED IN FLORIDA
* ONLY ADMITTED IN ILLINOIS
□ ONLY ADMITTED IN WISCONSIN
□ ADMITTED TO PRACTICE BEFORE THE
PATENT AND TRADEMARK OFFICE

REPLY TO: LANSING

April 26, 1997

Ms. Nanette Petruzzelli
Acting General Counsel
Copyright GCR
P.O. Box 70400
Southwest Station
Washington, D.C. 20024

Comment Letter

RM 97-1

No. 1

VIA FEDERAL EXPRESS
208 2nd St., SE
Washington, D.C. 20003

RE: Written Testimony of St. Croix Cable TV, Docket No. 97-1

Dear Ms. Petruzzelli:

We enclose fifteen copies of the Written Testimony of St. Croix Cable TV. We enclose an additional copy and ask that your office date-stamp it and return it in the attached Federal Express envelope.

Should you have any questions, please feel free to contact me.

Very truly yours,
HOWARD & HOWARD

Christopher C. Cinnamon

Enclosures
cc w/enc:

St. Croix Cable TV
William Roberts
Marilyn Kretsinger
Patricia Sinn
Willie Adams
Eric E. Breisach

GENERAL COUNSEL
OF COPYRIGHT

APR 28 1997

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Before the
Library of Congress
Copyright Office
Washington, D.C. 20540

GENERAL COUNSEL
OF COPYRIGHT

APR 28 1997

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Public Hearings Concerning the)
Revision of the Cable and)
Satellite Carrier Compulsory)
Licenses)

Docket No. 97-1

WRITTEN TESTIMONY

OF

ST. CROIX CABLE TV

Comment Letter

RM 97-1

No. 1

Christopher C. Cinnamon
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Howard & Howard
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Attorneys for
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April 26, 1997

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SUMMARY

The current application of Section 111 unfairly imposes higher copyright costs on smaller market cable systems and their customers. The problem persists because the Copyright Office continues to apply outdated FCC rules. The old rules do not work. No reasonable legal or policy justification exists for imposing disparate copyright burdens on smaller market cable systems. Still, this inequity continues unchecked by the Copyright Office. The Copyright Office should fix this problem now.

St. Croix Cable submits this testimony because it is one of the few smaller market cable systems that files Form SA3. Because the old FCC rules restricted smaller market cable systems to one independent signal, the Copyright Office requires St. Croix Cable to pay the 3.75% fee on all but one superstation that it carries. The Copyright Office allows major market cable systems to import up to three independent stations without incurring the 3.75% fee.

The result for St. Croix Cable? St. Croix Cable and its customers must pay over 385% more in copyright costs, solely because they reside in a smaller market. St. Croix Cable believes a few other cable systems suffer the same inequity.

The FCC's market quota rules and Section 111.

The FCC's market quota old rules permitted cable systems serving smaller markets to carry only one independent signal, while cable systems serving the top 50 markets could carry three independent signals. Section 111 incorporates the FCC's broadcast signal carriage rules into the compulsory license and exempts permitted signals from the 3.75% fee. The Copyright Office has incorporated the FCC's rules into its compulsory license regulations.

In 1980, the FCC removed the permitted signal restrictions on cable systems serving smaller markets. After careful study, the FCC concluded that elimination of the market quota restrictions would not harm local broadcasters and would promote the welfare of consumers. The revised rules permitted cable systems serving small markets to carry any distant broadcast signal, subject to other broadcast signal carriage rules. Despite the change, the Copyright Office continues to apply the pre-1980 rules.

The impact on St. Croix.

St. Croix Cable and its customers must pay 385% more in copyright royalties only because they reside in a small market. St. Croix Cable now pays over \$61,600 in copyright royalties per reporting period. Moved to Miami, St. Croix Cable would pay about \$16,300 in copyright royalties. Puerto Rico, only 60 miles from St. Croix, offers an equally irrational comparison. No cable system in Puerto Rico pays a 3.75% fee for any distant signal. Consequently, moved to Puerto Rico, St. Croix Cable would pay about \$16,300 in copyright royalties.

The bottom line: St. Croix Cable and its subscribers must pay substantially more in copyright costs than subscribers in other areas, solely because of geographic location.

No legal or policy basis exists to impose greater copyright burdens on cable systems serving smaller markets.

Congress enacted Section 111 for two principal reasons: (1) to fairly compensate copyright owners; and (2) to reduce transaction costs. Nowhere does the statute, the legislative history or interpretive case law say that the Copyright Office should administer Section 111 to impose disparate copyright burdens on small market cable systems and their customers.

Moreover, Congress expressly authorized the Copyright Office to adjust copyright royalties if the FCC changed its pre-1980 distant signal rules. Nonetheless, the disparate treatment of smaller market cable systems continues.

The impact is especially harsh on U.S. Virgin Island cable systems that rely heavily on superstations. In adopting the 1972 market quota rules, the Commission indicated that remote regions, like the U.S. Virgin Islands should receive special consideration.

The Copyright Office should change its policies or rules to remove the disparate copyright burdens placed on small markets.

St. Croix Cable has brought this issue to the Copyright Office before. The Copyright Office seemed sympathetic to the concerns of small market cable systems, but suggested that it did not have the authority to change the current compulsory license system. St. Croix Cable disagrees.

Sections 111 and 801 vest ample authority in the Copyright Office to implement the compulsory license in a manner that fairly effectuates the statute. Section 801 expressly authorizes the Copyright Office to adjust Section 111 royalties if the FCC changes its market quota rules "to insure that the rates for the additional distant signal equivalents are reasonable in the light of the changes effected by [the revised FCC market quota rules]." Reasonable copyright rates will not impose disparate burdens on smaller markets. The courts also have expressly recognized the authority of the Copyright Office to develop evolving interpretations of 17 U.S.C. § 111.

The Copyright Office has ample authority to correct the current unreasonable treatment of smaller market cable. Moreover, allowing smaller market cable systems to use post-1980

market quota rules will not conflict with the duties of the Copyright Office in implementing Section 111 because the change will have a de minimis impact on copyright owners. Any change to Copyright Office rules that would affect royalty payments from these few smaller market cable systems will not create a statistically significant impact on aggregate royalties received by copyright owners. Any slight impact on copyright owners is further ameliorated by payments St. Croix Cable must already make to cablecast superstations.

The Copyright Office should stop the disparate copyright burdens imposed on smaller market cable systems.

St. Croix Cable proposes four alternative solutions to rectify the problem. Any one of the first three alternatives will promptly resolve the matter at the Copyright Office.

- **The Copyright Office should apply the revised FCC market quota rules to smaller market cable systems.**

In the alternative, the Copyright Office should revise its rules to permit smaller market cable systems to use the revised FCC market quota rules. These rules will allow smaller market cable systems to cablecast any distant broadcast signal without the 3.75 % fee.

- **The Copyright Office should establish regulatory parity between markets.**

If the Copyright Office will not allow smaller market cable systems to use the revised market quota rules, then it should establish regulatory parity between markets. Smaller market systems should be allowed to carry three distant signals on a permitted basis. No legal or policy justification supports higher copyright costs for cable systems and customers residing in smaller markets.

- **The Copyright Office should change its rules to allow cable systems outside the 48 contiguous states to carry any number of distant signals on a permitted basis.**

The Copyright Office should create special rules for cable systems outside of the 48 contiguous states. The Copyright Office already allows Puerto Rico cable systems to carry all distant signals and superstations with no 3.75% fee. The Copyright Office should extend this treatment to other geographically remote cable systems, including those in the U.S. Virgin Islands, which rely heavily on distant signals.

- **The Copyright Office should recommend to Congress changes to Section 111 that remove the disparate copyright burdens imposed on smaller market cable systems.**

St. Croix Cable asks the Copyright Office to act now and initiate the process to change its rules. St. Croix Cable is sympathetic to concerns over allocation of administrative resources at the Copyright Office. Nonetheless, inaction only perpetuates the unfair imposition of higher copyright costs on smaller market cable systems.

In reporting on copyright reform to the Senate Judiciary Committee, the Copyright Office should include this issue. Congress has shown increasing sensitivity to alleviating regulatory burdens and costs on small businesses. If the Copyright Office does not act, legislative reform offers the last opportunity for relief.

This docket provides the Copyright Office with a critical opportunity to rectify the disparate copyright burdens on certain smaller market cable systems. Continued application of pre-1980 market quota rules imposes inordinately high copyright costs on cable systems like St. Croix. Congress did not intend this result with Section 111.

I. INTRODUCTION

The current application of Section 111 unfairly imposes substantially higher copyright costs on certain smaller market cable systems and their customers. No reasonable legal or policy justification exists for this result. The problem persists because the Copyright Office continues to apply outdated FCC rules. The FCC's old market quota rules restricted the number of distant signals that a smaller market cable system could carry. The FCC repealed these rules over 15 years ago. The Copyright Office should stop using them.

St. Croix Cable submits this testimony because it is one of the few smaller market cable systems that files Form SA3.¹ Because the old FCC rules restricted smaller market cable systems to one independent signal, St. Croix Cable must pay the 3.75% fee on all but one superstation that it carries. The Copyright Office allows major market cable systems to import up to three independent stations without incurring the 3.75% fee.

The result for St. Croix Cable? St. Croix Cable and its subscribers must pay over 385% more in copyright costs. For the 96/2 reporting period, St. Croix Cable paid about \$61,639 on gross receipts of \$710,578. If the same system served Miami, it would pay only about \$16,300. Similarly, if the same system served Puerto Rico, only 60 miles away, it would pay only about \$16,300.

The Copyright Office should remedy this unreasonable result. St. Croix has brought this issue to the Copyright Office once before. The Copyright Office concluded it did not have the authority to make this change. St. Croix Cable disagrees. No provision of Section 111, the legislative history, or public policy supports charging cable systems and customers more just

¹See exhibit 1 for background information on St. Croix Cable.

because they reside in a smaller market.

The Copyright Office should take action now to fix this problem. St. Croix Cable provides specific alternatives in this testimony.

II. CURRENT REGULATIONS UNFAIRLY PENALIZE CABLE SYSTEMS AND SUBSCRIBERS IN SMALLER MARKETS.

A. Cable systems serving smaller markets must pay more for distant independent signals because the Copyright Office continues to use outdated FCC rules.

The Copyright Office applies the FCC's pre-1980 market quota rules in determining a cable operator's liability for the 3.75% for certain distant signals.² Established in 1966 and revised in 1972, the market quota rules aimed to protect local broadcasters by restricting the number of distant signals that a cable system could carry.³ The FCC repealed its market quota rules in 1980. Because the Copyright Office continues to apply these outdated rules, St. Croix Cable and a few other smaller market SA3 filers must pay substantially more in copyright royalties, solely because they serve smaller television markets.

The continued use of the pre-1980 market quota rules makes no sense. A review of those rules shows why.

²37 C.F.R. § 201.17(h)(5)(ii)(B).

³See *Malrite T. V. of New York v. FCC*, 652 F.2d 1140, 1144 (2nd Cir. 1981) ("[The FCC's] 1966 regulations initiated close to a decade of regulation that can be described as hostile to the growth of the cable industry, as the FCC sought to protect, in the name of localism and program diversity, the position of existing broadcasters and, particularly, the struggling UHF stations. . . . Though the 1972 rules eased the 1966 restrictions and permitted limited cable expansion, broadcasting interests were still strongly protected.")

1. The FCC's pre-1980 market quota rules and Section 111.

In 1972, the FCC promulgated the market quota rules that the Copyright Office still uses. These rules regulated the number of broadcast signals a cable system could carry. The number of permitted signals varied with the size of the market served by the cable system. The FCC adopted this graduated system of permitted signals to protect local broadcasters from erosion of audience share during the television market that existed at that time.⁴

The 1972 rules permitted cable systems serving the top 50 television markets to carry three independent distant signals.⁵ Cable systems serving the next 50 largest markets could carry two independent distant signals.⁶ Cable systems serving communities outside the top 100 television markets could carry only one independent signal.⁷ Finally, cable systems serving communities outside of all television markets could carry any number of independent signals.⁸

Section 111 incorporates the FCC's market quota rules into the compulsory license. Section 111 establishes that "distant signal equivalents" or "DSEs" are subject to the additional 3.75% fee. The definition of "distant signal equivalent" in Section 111(h) ~~excludes~~ distant signals that the FCC market quota rules permit a cable system to carry.⁹ In short, the statute

⁴*Malrite v. FCC*, 652 F.2d at 1144.

⁵47 C.F.R. § 76.61(b) (1980).

⁶47 C.F.R. § 76.63(a) (1980).

⁷47 C.F.R. § 76.59(b) (1980).

⁸47 C.F.R. § 76.57(b) (1980).

⁹17 U.S.C. § 111(f) states:

A "distant signal equivalent" is the value assigned to the secondary

(continued...)

exempts permitted signals from the 3.75% fee.

The Copyright Office has incorporated the permitted signal exception into its compulsory license regulations.¹⁰ As published in 1984, the permitted signal exception referred to "carriage of no more than the number of distant signals which was or would have been allotted to the cable system under the FCC's quota for importation of network and on specialty independent stations [47 C.F.R. 76.59(b), 76.61(b) and (c) and 76.63, referring to 76.61 (b) and (c), in effect on June 24, 1981]." The June 24, 1981 date is significant. The day after that date, new FCC permitted signal rules went into effect.

2. The FCC changed its market quota rules in 1980.

In 1980, the FCC removed the permitted signal restrictions on cable systems serving

⁹(...continued)

transmission of any nonnetwork television programming carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programming. It is computed by assigning a value of one to each independent station and a value of one-quarter to each network station and noncommercial education station for the nonnetwork programming so carried pursuant to the rules, regulations, and authorizations of the Federal Communications Commission. The foregoing values for independent, network, and noncommercial educational programming are subject, however, to the following exceptions and limitations. Where the rules and regulations of the Federal Communications Commission . . . permit a cable system . . . to carry additional programs not transmitted by primary transmitters within whose local service area the cable system is located, no value shall be assigned for the substituted or additional programming.

¹⁰37 C.F.R. § 201.17.

smaller markets.¹¹ The Commission concluded:

[W]e find that cable television does not affect materially the quantity of local programming broadcast by local television stations. Additionally, we find any claims of adverse impact from cable on the quality of television programming to be unsupported by economic theory and by socioeconomic evidence.

* * *

[W]e believe that relaxation of our distant signal carriage rules will promote substantial improvements in television service to the public without causing any significant loss of the existing levels of service provided by local television broadcast stations. We have found in our analysis of the evidence in this proceeding that competition from cable television has improved television service to the public and will continue to do so in the future. More specifically, in terms of the criteria for evaluation of these rules set forth, we do not believe the elimination of the rules will have undesirable distribution or external effects and we believe their elimination will promote the welfare of consumers generally.¹²

The revised rules permitted cable systems serving small markets to carry any distant broadcast signal, subject to syndicated exclusivity, network nonduplication and other restrictions.¹³

Administrative challenges and litigation stayed the implementation of the rules until June 25, 1981. On that date, the decision of the Second Circuit upholding the rules became effective.¹⁴ The court stated:

The Commission's repeal of the distant signal and syndicated exclusivity rules, after widespread participation of all industry segments and comprehensive evaluation of technical data, reflects the 'rational weighing of competing policies' Congress intended to be exercised by the agency and to be sustained by a

¹¹*Report and Order*, Dockets NO. 20988 and 21284, FCC 80-443 (September 11, 1980) ("*1980 Report and Order*").

¹²*1980 Report and Order*, ¶¶ 156 and 191.

¹³47 C.F.R. § 76.59(b) (1981).

¹⁴*Malrite v. FCC*, 652 F.2d 1140.

reviewing court.¹⁵

The FCC and the courts recognized the substantial public interest in increased carriage of distant independent stations in smaller markets. Still, the Copyright Office's rules continue to penalize smaller market SA3 filers.

3. The Copyright Office continues to apply the pre-1980 rules.

Although the FCC repealed its restrictions on distant signals, the Copyright Office continues to base the 3.75% fee liability on the old rules. This forces cable systems serving smaller markets to pay substantially higher copyright fees. No justification for this anomaly exists.

The next section demonstrates the inequity of the current treatment for cable systems serving small markets.

B. St. Croix Cable and its customers must pay over 385% more in copyright royalties only because they reside in a small market.

1. St. Croix Cable now pays over \$61,000 in copyright royalties per reporting period.

For the 96/2 reporting period, St. Croix Cable paid about \$61,639 on gross revenues of about \$710,578.¹⁶ This equates to a per subscriber copyright cost of \$0.81 per month. Over 85% of this cost arises from the two superstations carried by St. Croix that the Copyright Office considers "non-permitted." St. Croix Cable believes that few, if any, U.S. cable systems pay this much per subscriber in copyright royalties. The only reason that St. Croix Cable pays this much is because it serves a smaller market.

¹⁵652 F.2d at 1152.

¹⁶Exhibit 2, 96/2 SA3 (actual), p. 7.

2. **Moved to Miami, St. Croix Cable would pay about \$16,000 in copyright royalties.**

Using the same data from the 96/2 reporting period, assume St. Croix Cable served Miami, the closest major television market.¹⁷ In this case, the three super stations carried by the system would qualify as permitted signals. Copyright costs to the cable operator and its customers would drop substantially.

If moved to Miami, St. Croix Cable would pay about \$16,346 for the 96/2 reporting.¹⁸ This equates to about \$0.21 per subscriber per month, solely due to geographic location.

3. **Moved to Puerto Rico, St. Croix Cable would pay about \$16,000 in copyright royalties.**

Puerto Rico, only 80 miles from St. Croix, offers an equally irrational comparison.¹⁹ No cable system in Puerto Rico pays a 3.75% fee for any distant signal. All superstations and other distant independents qualify as "specialty station" programming under current Copyright Office policy. WTBS, WGN, WOR and others, all English language programming, the same superstations for which St. Croix Cable and its customers pays the 3.75% fee, incur no additional copyright fees for Puerto Rico cable systems.

If moved to Puerto Rico, St. Croix Cable would pay about \$16,346 for the 96/2 reporting.²⁰ The equates to about \$0.21 per subscriber per month, solely due to geographic location.

¹⁷Exhibit 3, 96/2 SA3 (Miami pro forma).

¹⁸Exhibit 3, p. 7.

¹⁹Exhibit 4, 96/2 (SA3) (Puerto Rico pro forma).

²⁰Exhibit 4, p. 7.

The following chart shows the disparity:

System Location	Distant Signals Carried	Gross Receipts	Subscribers	Royalties	Cost per Customer per Month
St. Croix, USVI	W/TBS, WGN, WOR, WRAL, WNBC	\$710,578	12,716	\$61,639	\$0.81
Miami	WTBS, WGN, WOR, WRAL, WNBC	\$710,578	12,716	\$16,347	\$0.21
Puerto Rico	WTBS, WGN, WOR, WRAL, WNBC	\$710,578	12,716	\$16,347	\$0.21

The bottom line: St. Croix Cable and its customers must pay over 385% more in copyright fees for the same programming.

C. No law or policy justifies imposing greater copyright burdens on cable systems serving smaller markets.

Congress enacted Section 111 for two principal reasons: (1) to fairly compensate copyright owners; and (2) to reduce transaction costs.²¹ Nowhere does the statute, the legislative history or interpretive case law say that the Copyright Office should administer Section 111 to impose disparate copyright burdens on small market cable systems and their customers. Moreover, Congress expressly authorized the Copyright Office to adjust copyright royalties if the FCC changed its pre-1980 distant signal rules.²² Still, the disparate treatment of smaller market cable systems continues.

The FCC adopted its pre-1980 market quota rules to help preserve local programming in smaller markets. These rules came out in 1972 - before the proliferation of superstations and

²¹*Cablevision Systems Development Co. v MPAA*, 836 F.2d 599, 602 (D.C. Cir. 1988).

²²17 U.S.C. § 801(b)(2)(B).

before the marked expansion of cable in many smaller markets. When the FCC reassessed its market quota rules, it changed them to allow small market cable systems to carry any distant signal, without a penalty. The current application of Section 111 undermines this result and penalizes smaller market systems that import more than one independent.

The impact is especially harsh on U.S. Virgin Island cable systems that rely almost exclusively on distant signals. In adopting the 1972 market quota rules, the Commission indicated that remote regions, like the U.S. Virgin Islands, should receive special consideration.²³

[W]e believe it appropriate on our own motion that some additional consideration be given to the applicability of the rules to cable systems operating in Alaska, Puerto Rico, Hawaii, and other areas not included within the 48 contiguous states. Because of the unique situation with respect to broadcasting and cable television in these areas we believe some special consideration may be called for. . . . It is likely that other areas such as the Virgin Islands are likewise dissimilar from otherwise comparable areas within the 48 states. Because of the peculiar circumstances with respect to cable in these areas we believe it appropriate to treat certificate of compliance applications from these area on an ad hoc basis. . . . We believe this is an appropriate method of proceeding, since these areas are not likely to be strictly comparable to those areas for which the rules were designed.²⁴

The Commission later adjusted its application of specialty station and other rules for Puerto Rico in recognition of the special circumstances of cable systems located outside of the contiguous 48 states.²⁵ The Commission allowed carriage of distant signals in Puerto Rico as specialty stations because "such carriage almost invariably increases the diversity of the programming

²³*Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326 (1972), ¶ 123.

²⁴*Id.*

²⁵*Cable Television of Puerto Rico*, 46 FCC 2d 1096 (1974); *Cable Television of Puerto Rico*, 68 FCC 2d 609 (1978).

available to cable subscribers without diminishing the local stations' ability to serve the public."²⁶ Again, the Commission made this ad hoc adjustment to its rules because those rules "were designed with the characteristics of the forty-eight contiguous states in mind."²⁷ The Copyright Office will serve precisely the same interests by changing its market quota rules for smaller market cable systems like St. Croix Cable.

D. The Copyright Office should change its rules to remove the disparate copyright burdens placed on smaller markets.

St. Croix Cable has brought this issue to the Copyright Office before.²⁸ The Copyright Office seemed sympathetic to the concerns of small market cable systems, but did not believe that it had the authority to change the current compulsory license system.²⁹ St. Croix Cable disagrees. The Copyright Act and interpretive case law show that the Copyright Office has ample authority to fix this problem.

1. The Copyright Office has ample authority to change its rules to treat smaller market cable systems more fairly.

Sections 111 and 801 vest in the Copyright Office authority to implement the compulsory license in a manner that fairly effectuates the statute. Section 801 expressly authorizes the Copyright Office to adjust Section 111 royalties if the FCC changes its market quota rules.³⁰

²⁶68 FCC 2d 609, ¶ 7.

²⁷*Id.* at ¶ 2.

²⁸Exhibit 5, August 29, 1996 letter to Marilyn J. Kretsinger, Assistant General Counsel from Christopher C. Cinnamon, Howard & Howard.

²⁹Exhibit 6, February 14, 1997 letter to Christopher C. Cinnamon, Howard & Howard from Marilyn J. Kretsinger, Assistant General Counsel.

³⁰17 U.S.C. § 801(b)(2)(B).

The Copyright Office may adjust royalty rates "to insure that the rates for the additional distant signal equivalents are reasonable in the light of the changes effected by [the revised FCC market quota rules]." Reasonable royalties rates do not impose disparate burdens on smaller market systems.

Similarly, the D.C. Circuit has expressly recognized the authority of the Copyright Office to develop evolving interpretations of 17 U.S.C. § 111:

The Copyright Office certainly has greater expertise in such matters than do the federal courts; and while watching over the cable industry may have been a novel brief for the Copyright Office when the new Act was passed, that agency has had time to accumulate experience.³¹

The Copyright Office's accumulating experience must include an understanding of the disparate impact of Copyright Office rules on smaller market cable systems. "Congress saw a need for continuing interpretation of Section 111 and thereby gave the Copyright Office statutory authority to fill that role."³² The Copyright Office will fulfill this role by changing its rules for smaller market cable systems like St. Croix Cable.

2. Using the post-1980 market quota rules will have a de minimis impact on copyright owners.

Allowing smaller market cable systems to use post-1980 market quota rules will not conflict with the duties of the Copyright Office in implementing Section 111. Most broadly, the purpose of Section 111 is to structure an efficient mechanism for compensation of copyright owners for non-network programs cablecast far from the original area of broadcast.³³ The

³¹*Cablevision Systems Development v. Motion Picture Ass'n. of America, Inc.*, 836 F.2d 599, 608-609 (D.C. Cir. 1988).

³²*Id.* at 610 (emphasis added).

³³*Cablevision Systems Development Co.*, 836 F.2d at 603.

change requested here will not impede the achievement of this purpose because the change will have a de minimis impact on copyright owners.

St. Croix Cable serves a tiny fraction of U.S. cable subscribers. There are currently about 61,700,000 cable subscribers in the U.S.³⁴ St. Croix Cable serves only 2/100 of 1% the nation's subscribers. St. Croix believes only a handful of other cable systems in the U.S. serve smaller markets and generate revenues sufficient to file SA3s. Any change to Copyright Office rules that would affect royalty payments from these few smaller market cable systems will not create a statistically significant impact on aggregate royalties received by copyright owners. Any slight impact on copyright owners is further ameliorated by payments St. Croix Cable must already make to cablecast distant signals. Today, distant signals are predominantly superstations. Cable systems must pay affiliate fees to each superstation carried. The copyright holders are already being compensated. Superstations also earn substantial revenue from national advertising sales.³⁵ As a result of increased advertising revenue and affiliate fees that cable operators must pay, the likelihood of under compensation of copyright owners is negligible.

³⁴Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, *Order and Notice of Proposed Rulemaking*, CS Dock. No. 96-85, FCC 96-154 (April 9, 1996), ¶ 26.

³⁵*Cablevision Systems Development Co.*, 836 F.2d at 603. ("Because national advertisers will pay to reach any incremental viewer, networks will be willing and able to pay copyright holders the full value placed on the receipt of the program by viewers.")

III. THE COPYRIGHT OFFICE SHOULD STOP THE DISPARATE COPYRIGHT BURDENS IMPOSED ON SMALLER MARKET CABLE SYSTEMS.

The Copyright Office should take action now to stop the disparate copyright burdens imposed on smaller market cable systems. St. Croix Cable proposes below three alternative solutions for remedying the problem administratively. Any one of these proposals will ameliorate the current unfairness. As a last resort, St. Croix Cable asks for the Copyright Office's assistance in recommending a legislative solution.

A. The Copyright Office should apply the revised FCC market quota rules to smaller market cable systems.

The Copyright Office can promptly remedy the problem by permitting smaller market cable systems to use the revised FCC market quota rules. These rules allow smaller market cable systems to carry any distant broadcast signal. The few smaller market cable systems that file SA3's then would count distant independent signals as permitted signals. As a result, smaller market cable systems would no longer have to pay substantially more for imported superstations just because of geographic location.

B. The Copyright Office should establish regulatory parity between markets.

If the Copyright Office will not allow smaller market cable systems to use the revised market quota rules, then it should establish regulatory parity between markets. Smaller market systems should be allowed to carry three distant signals on a permitted basis. No legal or policy justification supports higher copyright costs for cable systems and customers just because they reside in smaller markets. Allowing smaller market cable systems to carry three permitted signals will help rectify the current unfairness.

- C. The Copyright Office should change its rules to allow cable systems outside the 48 contiguous states to carry any number of distant signals on a permitted basis.**

As an alternative, the Copyright Office should create special rules for cable systems outside of the 48 contiguous states. The Copyright Office already allows Puerto Rico cable systems to carry all distant signals and superstations with no 3.75% fee. The Copyright Office should extend this treatment to other geographically remote cable systems, including those in the U.S. Virgin Islands, which rely heavily on distant signals.

In promulgating the pre-1980 market quota rules the FCC recognized that cable systems outside the 48 contiguous states warrant special consideration. Copyright Office rules should incorporate this policy and expand the permitted signal allowance for geographically remote cable systems.

- D. The Copyright Office should recommend to Congress changes to Section 111 that remove the disparate copyright burdens imposed on smaller market cable systems.**

St. Croix Cable asks the Copyright Office to act now and initiate the process to change its rules. St. Croix Cable is sympathetic to concerns over allocation of administrative resources at the Copyright Office. Nonetheless, inaction only perpetuates the unfair imposition of higher copyright costs on smaller market cable systems.

In reporting on copyright reform to the Senate Judiciary Committee, the Copyright Office should include this issue. Congress has shown increasing sensitivity to alleviating regulatory burdens and costs on small businesses. If the Copyright Office does not act, legislative reform offers the last opportunity for relief.

IV. CONCLUSION

This docket provides the Copyright Office with a critical opportunity to rectify the disparate copyright burdens imposed on certain smaller market cable systems. Continued application of pre-1990 market quota rules imposes inordinately high copyright costs on cable systems like St. Croix. Congress did not intend this result with Section 111.

The Copyright Office should act now to change its rules to allow smaller market cable systems to carry additional permitted independents. The Copyright Office should initiate implementation of the administrative alternatives proposed in this testimony. In addition to initiating the process to amend its rules, the Copyright Office can recommend to Congress that it amend Section 111 to remove reliance on old FCC market quota rules.

Respectfully submitted,



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Attorneys for
St. Croix Cable TV

April 26, 1997

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ST. CROIX CABLE TV - BACKGROUND

A. St. Croix Cable.

St. Croix Cable serves as the primary multichannel video programming distributor on St. Croix. A family-run business, St. Croix Cable began operations in 1981 and now serves about 12,700 customers on St. Croix. Only one network affiliate and one educational channel are available off-air in St. Croix. Consequently, St. Croix residents rely on cable television for nearly all news, educational and entertainment programming.

B. The island of St. Croix.

St. Croix is the largest island in the U.S. Virgin Islands and encompasses 84 square miles. Population totals 51,300. St. Croix lies less than 60 miles southeast of Puerto Rico. The annual medium income per household on St. Croix is \$22,050, substantially below that of the United States.¹

St. Croix's economy reflects the lower level of development of Puerto Rico and other island territories. In addition, devastating hurricanes have further hindered economic development. In 1989 hurricanes destroyed 90% of the island's buildings and left nearly half of its population homeless. The 1994 and 1995 hurricane seasons were also very destructive.

The St. Croix population reflects substantial ethnic and linguistic diversity. Less than half of all U.S. Virgin Island residents are native born. St. Croix's population is primarily African-American. While English is the official language, many citizens speak other languages or dialects. A primary spoken language in St. Croix is also the West Indian dialect Calypso.²

¹Bureau of the Census, U.S. Department of Commerce, 1990 Census of Population, Social and Economic Characteristics, Urbanized Areas 24, 403 (1993) (annual medium income per U.S. household - \$30,005).

²29 The New Encyclopedia Britannica 776 (15th ed. 1993).

The number of residents migrating from Puerto Rico has also steadily increased in recent years. An estimated 7,300 persons on St. Croix indicate that Spanish is their primary language.³

C. St. Croix Cable's current copyright situation.

St. Croix Cable currently cablecasts nine broadcast channels.⁴ Four of these signals are local signals⁵ and include the only channel of network programming available in St. Croix. St. Croix Cable imports five distant signals, including two network affiliates and three superstations. Because St. Croix Cable serves a smaller television market, it may carry only one independent television station on a permitted basis.⁶ Consequently, St. Croix Cable currently pays the 3.75% fee on 2.00 DSEs due to the two non-permitted independents.⁷

The economic impact is substantial for a small island cable system. For the 96/2 reporting period, St. Croix Cable paid \$61,639.00 in copyright royalties on gross receipts of \$710,577.00.⁸ This resulted in an average annual royalty fee per subscriber of about \$10/year or \$0.81/month. About 86% of this liability arose from the 2.00 DSEs subject to the 3.75% fee. For many subscribers, copyright royalties represent nearly 10% of the cost of cable service. No cable system in any major market faces such high per subscriber copyright costs.

³Statistical Abstract of U.S., 1993, U.S. Dept. of Commerce, Economic and Statistics Administration, Bureau of the Census; Worldstream, February 27, 1995.

⁴These are: WKAQ, San Juan, PR; WAPA, San Juan, PR; WSVI, Christiansted, VI; WTJX, Charlotte Amalie, VI; WTBS, Atlanta, GA; WGN, Chicago, IL; WWOR, Secaucus, NJ; WRAL, Raleigh Durham, NC; WXIA, Atlanta, GA.

⁵Although characterized as local signals, three of these signals are located on other islands and are not available off-air.

⁶47 CFR 76.59(b) (1981).

⁷See Exhibit 1, St. Croix Cable TV, 96/2 SA3, p. 13.

⁸See Exhibit 2, p. 7.

STATEMENT OF ACCOUNT

*or Secondary Transmissions by
Cable Systems (Long Form)*

FOR COPYRIGHT OFFICE USE ONLY	
DATE RECEIVED	AMOUNT
	\$
	ALLOCATION NUMBER

A Accounting Period	ACCOUNTING PERIOD COVERED BY THIS STATEMENT: JULY 1 - DECEMBER 31, 1996
----------------------------------	-----------------------------------------------------------------------------------

INSTRUCTIONS:
Your file has been established under the information given below. If there are any changes, draw a line through the incorrect information and print or type the correct information beside it.
Give the full legal name of the owner of the cable system. If the owner is a subsidiary of another corporation, give the full corporate title of the subsidiary, not that of the parent corporation.
List any other name or names under which the owner conducts the business of the cable system.

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32

003842 96/2 SA 3

**SAINT CROIX CABLE TV
P.O. BOX 5968
SAINT CROIX, VI 00823-5968**

INSTRUCTIONS: In line 1, give any business or trade names used to identify the business and operation of the system unless these names already appear in space 8. In line 2, give the mailing address of the system, if different from the address given in space 8.

4	IDENTIFICATION OF CABLE SYSTEM:
---	---------------------------------

MARLIN ADDRESS OF CABLE SYSTEM:

2

4501 Estate Diamond

Christiansted, St. Croix USVI 00820

(City, Town, State, ZIP Code)

INSTRUCTIONS: List each separate community served by the cable system. A "community" is the same as a "community unit" as defined in FCC rules: "... a separate and distinct community or municipal entity (including unincorporated communities within unincorporated areas and including single, discrete unincorporated areas.)" 47 C.F.R. §78.54(mm). The first community that you list will serve as a form of system identification hereafter known as the "First Community." Please use it as the First Community on all future filings.

Note: Enclaves and properties such as hotels, apartments, condominiums or mobile home parks should be reported in parentheses below the identified city.

CITY OR TOWN

STATE

CITY OR TOWN

STATE

SAINT CROIX

VI

LEGAL NAME OF OWNER OF CABLE SYSTEM

SAINT CROIX CABLE TV 003842

Name

SECONDARY TRANSMISSION SERVICE: SUBSCRIBERS AND RATES

In General: The information in space E should cover all categories of "secondary transmission service" of the cable system; that is, the retransmission of television and radio broadcasts by your system to subscribers. Give information about other services (including pay cable) in space F, not here. All the facts you state must be those existing on the last day of the accounting period (June 30 or December 31, as the case may be).

Number of Subscribers: Both blocks in space E call for the number of subscribers to the cable system, broken down by categories of secondary transmission service. In general, you can compute the number of "subscribers" in each category by counting the number of billings in that category (the number of persons or organizations charged separately for the particular service at the rate indicated—not the number of sets receiving service).

Rate: Give the standard rate charged for each category of service. Include both the amount of the charge and the unit in which it is generally billed. (Example: "\$8/mth"). Summarize any standard rate variations within a particular rate category, but do not include discounts allowed for advance payment.

Block 1: In the left-hand block in space E, the form lists the categories of secondary transmission service that cable systems most commonly provide to their subscribers. Give the number of subscribers and rate for each listed category that applies to your system. Note: Where an individual or organization is receiving service that falls under different categories, that person or entity should be counted as a "subscriber" in each applicable category. Example: a residential subscriber who pays extra for cable service to additional sets would be included in the count under "Service to the First Set," and would be counted once again under "Service to Additional Set(s)."

Block 2: If your cable system has rate categories for secondary transmission service that are different from those printed in block 1, (for example, tiers of services which include one or more secondary transmissions), list them, together with the number of subscribers and rates, in the right-hand block. A two or three word description of the service is sufficient.

E

Secondary
Transmission
Service:
Subscribers
and Rates

BLOCK 1

CATEGORY OF SERVICE	NO. OF SUBSCRIBERS	RATE
Residential:		
• Service to First Set	12,716	9.90
• Service to Additional Set(s)		-0-
• FM Radio (if separate rate)		-0-
Motel, Hotel		
Commercial		
• Inverter		
• Residential		
• Non-Residential		

BLOCK 2

CATEGORY OF SERVICE	NO. OF SUBSCRIBERS	RATE

SERVICES OTHER THAN SECONDARY TRANSMISSIONS: RATES

In General: Space F calls for rate (not subscriber) information with respect to all your cable system's services that were not covered in space E. That is, those services that are not offered in combination with any secondary transmission service for a single fee. There are two exceptions: you do not need to give rate information concerning: (1) services furnished at cost; and (2) services or facilities furnished to nonsubscribers. Rate information should include both the amount of the charge and the unit in which it is usually billed. If any rates are charged on a variable per-program basis, enter only the letters "PP" in the rate column.

Block 1: Give the standard rate charged by the cable system for each of the applicable services listed.

Block 2: List any services that your cable system furnished or offered during the accounting period that were not listed in block 1 and for which a separate charge was made or established. List these other services in the form of a brief (two or three word) description, and include the rate for each.

F

Services
Other Than
Secondary
Transmissions:
Rates

BLOCK 1

CATEGORY OF SERVICE	RATE
Continuing Services:	
• Pay Cable	10/9
• Pay Cable—Add'l Channel	1.00
• Fire Protection	-0-
• Burglar Protection	-0-
Installation: Residential	
• First Set	33.08
• Additional Set(s)	9.84
• FM Radio (if separate rate)	-0-
• Converter	

CATEGORY OF SERVICE	RATE
Installation: Non-Residential	
• Motel, Hotel	
• Commercial	
• Pay Cable	
• Pay Cable—Add'l Channel	
• Fire Protection	
• Burglar Protection	
Other Services:	
• Reconnect	
• Disconnect	
• Outlet Relocation	
• Move to New Address	

BLOCK 2

CATEGORY OF SERVICE	RATE
Superior Service	13.50
People's Choice	4.95

BEST AVAILABLE COPY

LEGAL NAME OF OWNER OF CABLE SYSTEM:

SAINT CROIX CABLE TV 003842

Keywords

PRIMARY TRANSMITTERS: RADIO

In General: List every radio station carried on a separate and discrete basis and list those FM stations carried on an -band basis whose signals were "generally receivable" by your cable system during the accounting period.

Special Instructions Concerning All-Band FM Carriage: Under Copyright Office Regulations, an FM Signal is "generally receivable" if: (1) "It is carried by the system whenever it is received at the system's headend"; and (2) it can be expected, on the basis of monitoring, to be received at the headend, with the system's FM antenna, during certain stated intervals. For detailed information about the the Copyright Office Regulations on this point, see page (v) of the General Instructions.

Column 1: Identify the call sign of each station carried.

Column 2: State whether the station is AM or FM.

Column 3: If the radio station's signal was electronically processed by the cable system as a separate and discrete signal, indicate this by placing a check mark in the "S/D" column.

Column 4: Give the station's location (the community to which the station is licensed by the FCC or, in the case of Mexican or Canadian stations, if any, the community with which the station is identified).

Primary Transmembrane Protein

[illegible]

Substitute Carriage: Special Statement and Program Log

In space 1, identify every nonnetwork television program, broadcast by a distant station, that your cable system carried on a substitute basis during the accounting period, under specific present and former FCC rules, regulations, or authorizations. For a further explanation of the programming that must be included in this log, see page (v) of the General Instructions.

• During the accounting period, did your cable system carry, on a substitute basis, any nonnetwork television program broadcast by a distant station? ☐ Yes ☐ No

2. LOG OF SUBSTITUTE PROGRAMS:

Column 1: Give the title of every nonnetwork television program ("substitute program") that, during the accounting period, was broadcast by a distant station and that your cable system substituted for the programming of another station under certain FCC rules, regulations, or authorizations. See page (v) of the General Instructions for further information. Do not use general categories like "movies" or "baseball." List specific program titles, for example, "I Love Lucy" or "NBA Basketball: 76ers vs. Bulls."

Column 2: If the program was broadcast live, enter "Yes". Otherwise enter "No".

Column 3: Give the call sign of the station broadcasting the substitute program.

Column 4: Give the broadcast station's location (the community to which the station is licensed by the FCC or, in the case of Mexican or Canadian stations, if any, the community with which the station is identified).

Column 8: Give the month and day when your system carried the substitute program. Use numerals, with the month first. Example: for May 7 give "5/7".

Column 8: State the times when the substitute program was carried by your cable system. List the times accurately, to the nearest five minutes. Example: a program carried by a system from 8:01:15 p.m. to 8:28:30 p.m. should be stated as "8:00-8:30 p.m."

Column 7: Enter the letter "R" if the listed program was substituted for programming that your system was required to delete under FCC rules and regulations in effect during the accounting period; or enter the letter "P" if the listed program was substituted for programming that your system was permitted to delete under FCC rules and regulations in effect on October 19, 1975.

[illegible]

Name	LEGAL NAME OF OWNER OF CABLE SYST SAINT CROIX CABLE TV 003842
K Gross Receipts	GROSS RECEIPTS Instructions: The figure you give in this space determines the form you file and the amount you pay. Enter the total of all amounts ("gross receipts") paid to your cable system by subscribers for the system's "secondary transmission service" (as identified in space E) during the accounting period. For a further explanation of how to compute this amount, see page (vi) of the General Instructions. Gross receipts from subscribers for secondary transmission service(s) during the accounting period. <u>\$ 710,577.79</u> (Amount of "gross receipts") IMPORTANT: You must complete a statement in space P concerning gross receipts.
L Copyright Royalty Fee	INSTRUCTIONS FOR COMPUTING THE COPYRIGHT ROYALTY FEE Use the blocks in this space L to determine the royalty fee you owe: • Complete block 1, showing your Minimum Fee. • Complete block 2, showing whether your system carried any distant television stations. • If your system did not carry any distant television stations, leave block 3 blank. Enter the amount of the Minimum Fee from block 1 in the box in block 4, and pay that amount with your Statement of Account. • If your system did carry any distant television stations you must complete the applicable parts of the DSE Schedule accompanying this form and attach the Schedule to your Statement of Account. ▶ If the number of permitted DSEs calculated in part 6, block B or part 5 of this Schedule is 1.0 or less, leave block 3 blank, and enter the amount of the Minimum Fee, from block 1 of this space, on line 1 in block 4. If the number of DSEs is greater than 1.0, enter in block 3 the amount of the Base Rate Fee from part 8 or part 9, block A of the Schedule. On line 1 in block 4, enter whichever amount is larger: the Minimum Fee from block 1 or the Base Rate Fee from block 3. ▶ If part 6 of the DSE Schedule was completed, enter on line 2 in block 4 below the amount from line 7 of block C. ▶ If part 7 or part 9, block B, of the DSE Schedule was completed, enter on line 3 in block 4 below the surcharge amount. Block 1 MINIMUM FEE: All cable systems with semiannual "gross receipts" of \$292,000 or more are required to pay at least the Minimum Fee, regardless of whether they carried any distant stations. This fee is .893 of one percent of the system's "gross receipts" for the accounting period. Line 1. Enter the amount of "gross receipts" from space K. <u>710,577.79</u> Line 2. Multiply the amount in line 1 by .00893 Enter the result here. <u>\$6,345.46</u> This is your Minimum Fee. Block 2 DISTANT TELEVISION STATIONS CARRIED: Your answer here must agree with the information you gave in space G. If, in space G, you identified any stations as "distant" by stating "Yes" in column 4, you must check "Yes" in this block. • Did your cable system carry any distant television stations during the accounting period? <input checked="" type="checkbox"/> Yes—Complete the DSE Schedule. <input type="checkbox"/> No—Leave block 3 below blank and complete line 1, block 4. Block 3 BASE RATE FEE: Enter the Base Rate Fee from either part 8, section 3 or 4, or Part 9, block A of the DSE Schedule. <u>\$</u> Block 4 Line 1. BASE RATE or MINIMUM FEE: If you did not complete block 3, enter the minimum fee from block 1. If you completed block 3, enter either the minimum fee from block 1 or the Base Rate Fee from block 3, whichever is larger. <u>\$ 8,345.74</u> Line 2. 3.75 Fee: Enter the total fee from line 7, block C, part 6 of the DSE Schedule. If none, enter zero. <u>\$ 53,293.34</u> Line 3. SYNDICATED EXCLUSIVITY SURCHARGE: Enter the fee from either part 7 (block D, section 3 or 4) or part 9 (block B) of the DSE Schedule. If none, enter zero. <u>\$ -0-</u> Line 4. INTEREST CHARGE: Enter the amount from line 4, space Q, page 9 (Interest Worksheet). <u>\$ -0-</u> TOTAL ROYALTY FEE. Add Lines 1, 2, 3, and 4 and enter total here. <u>\$61,639.08....</u> Remit this amount in the form of a certified check, cashier's check, or money order, payable to Register of Copyrights; or electronic payment. Do not send cash. EXCEPTION: If you listed the MINIMUM FEE in line 1 do not add this figure to the Total Royalty Fee if the 3.75 fee in line 2 exceeds the MINIMUM FEE. Instead, draw a line through the MINIMUM FEE and enter the sum from the following formula: gross receipts x .00893 x total "permitted" DSEs (from part 6, block B) = Fee for line 1. However, if the total "permitted" DSEs is zero then enter .000 on line 1.

LEGAL NAME OF OWNER OF CABLE SYSTEM:

SAINT CROIX CABLE TV 003842

Name

CHANNELS

INSTRUCTIONS: You must give: (1) the number of channels on which the cable system carried television broadcast stations to its subscribers; and, (2) the cable system's total number of activated channels, during the accounting period.

M

Channels

1. Enter the total number of channels on which the cable system carried television broadcast stations.

9

2. Enter the total number of activated channels on which the cable system carried television broadcast stations and nonbroadcast services.

61

INDIVIDUAL TO BE CONTACTED IF FURTHER INFORMATION IS NEEDED: (Identify an individual to whom we can write or call about this Statement of Account.)

N

Contact

Name Keith A. Kirkman

Telephone (809) 778-6701

(Area Code)

Address 4501 Estate Diamond

(Number, Street, Rural Route, Apartment or Suite Number)

Christiansted, St. Croix USVI 00820

(City, Town, State, ZIP Code)

CERTIFICATION: (This Statement of Account must be certified and signed in accordance with Copyright Office Regulations, as explained in the General Instructions.)

O

Certification

I, the undersigned, hereby certify that: (Check one, but only one, of the boxes.)

☐ Owner other than corporation or partnership) I am the owner of the cable system as identified in line 1 of space B; or

☐ Agent of owner other than corporation or partnership) I am the duly authorized agent of the owner of the cable system as identified in line 1 of space B, and that the owner is not a corporation or partnership; or

☒ (Officer or partner) I am an officer (if a corporation) or a partner (if a partnership) of the legal entity identified as owner of the cable system in line 1 of space B.

I have examined the Statement of Account and hereby declare under penalty of law that all statements of fact contained herein are true, complete, and correct to the best of my knowledge, information, and belief, and are made in good faith. (18 U.S.C., Section 1001(1986))

Handwritten signature: (X)



Typed or printed name: Keith A. Kirkman

Title: Vice President/Chief Operating Officer

(Title of official position held by corporation or partnership)

Date: February 26, 1997

Name P Statement of Gross Receipts	LEGAL NAME OF OWNER OF CABLE SYSTEM SAINT CROIX CABLE TV 003842																
SPECIAL STATEMENT CONCERNING GROSS RECEIPTS EXCLUSION The Satellite Home Viewer Act of 1988 amended Title 17, section 111(d)(1)(A), of the Copyright Act by adding the following sentence: "In determining the total number of subscribers and the gross amounts paid to the cable system for the basic service of providing secondary transmissions of primary broadcast transmitters, the system shall not include subscribers and amounts collected from subscribers receiving secondary transmissions for private home viewing pursuant to section 119." For more information on when to exclude these amounts, see the note on page(vi) of the General Instructions. During the accounting period did the cable system exclude any amounts of gross receipts for secondary transmissions made by satellite carriers to satellite home "dish" owners? <input type="checkbox"/> NO <input type="checkbox"/> YES. Enter the total here\$ -and list the satellite carrier(s) below.	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%; padding: 2px;">Name</td> <td style="width: 50%; padding: 2px;">Name</td> </tr> <tr> <td style="padding: 2px;">Mailing Address</td> <td style="padding: 2px;">Mailing Address</td> </tr> <tr> <td style="padding: 2px;">.....</td> <td style="padding: 2px;">.....</td> </tr> <tr> <td style="padding: 2px;">.....</td> <td style="padding: 2px;">.....</td> </tr> <tr> <td style="padding: 2px;">Name</td> <td style="padding: 2px;">Name</td> </tr> <tr> <td style="padding: 2px;">Mailing Address</td> <td style="padding: 2px;">Mailing Address</td> </tr> <tr> <td style="padding: 2px;">.....</td> <td style="padding: 2px;">.....</td> </tr> <tr> <td style="padding: 2px;">.....</td> <td style="padding: 2px;">.....</td> </tr> </table>	Name	Name	Mailing Address	Mailing Address	Name	Name	Mailing Address	Mailing Address
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Interest Assessment Q	WORKSHEET FOR COMPUTING INTEREST You must complete this worksheet for those royalty payments submitted as a result of a late payment or underpayment. For an explanation of interest assessment, see page (vi) General Instructions. Line 1. Enter the amount of late payment or underpayment\$ <div style="text-align: right;">x%</div> Line 2. Multiply line 1 by the interest rate* and enter the the sum here <div style="text-align: right;">x days</div> Line 3. Multiply line 2 by the number of days late <div style="text-align: right;">x .00274</div> Line 4. Multiply line 3 by .00274** enter here and on line 4, Block 4, space L, (page 7)\$ <div style="text-align: right;">(Interest charge)</div> <p>*Contact the Licensing Division at 202-707-8150 for the interest rate for the accounting period in which the late payment or underpayment occurred.</p> <p>**This is the decimal equivalent of 1/365, which is the interest assessment for one day late.</p> <p>NOTE: If you are filing this worksheet covering a Statement of Account already submitted to the Copyright Office, please list below the Owner, Address, First Community Served, and Accounting Period as given in the original filing.</p> <p>Owner</p> <p>Address</p> <p>.....</p> <p>First Community Served</p> <p>Accounting Period</p>
--------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

INSTRUCTIONS FOR DSE SCHEDULE

WHAT IS A "DSE"

The term "distant signal equivalent" ("DSE") refers to the numerical value given by the Copyright Act to each distant television station carried by a cable system during an accounting period. Your system's total number of DSEs determines the royalty you owe.

FORMULAS FOR COMPUTING A STATION'S DSE

There are two different formulas for computing DSEs: (1) a basic formula for all distant stations listed in space G (page 3); and (2) a special formula for those stations carried on a substitute basis and listed in space I (page 5). (Note that, if a particular station is listed in both space G and space I, a DSE must be computed twice for that station: once under the basic formula and again under the special formula. However, a station's total DSE is not to exceed its full type-value. If this happens, contact the Licensing Division.)

BASIC FORMULA: FOR ALL DISTANT STATIONS LISTED IN SPACE G OF SA3 (LONG FORM)

Step 1: Determine the station's TYPE-VALUE. For purposes of computing DSEs, the Copyright Act gives different values to distant stations depending upon their type. If, as shown in space G of your Statement of Account (page 3), a distant station is:

- INDEPENDENT: its type-value is ▶ 1.00
- NETWORK: its type value is ▶ .25
- NONCOMMERCIAL EDUCATIONAL: its type-value is ▶ .25

Note that local stations are not counted at all in computing DSEs.

Step 2: Calculate the station's BASIS OF CARRIAGE VALUE. The DSE of a station also depends on its basis of carriage. If, as shown in space G of your Form SA3, the station was carried part-time because of lack of activated channel capacity its basis of carriage value is determined by (1) calculating the number of hours the cable system carried the station during the accounting period; and (2) dividing that number by the total number of hours the station broadcast over the air during the accounting period. The basis of carriage value for all other stations listed in space G is 1.0.

Step 3: Multiply the result of step 1 by the result of step 2. This gives you the particular station's DSE for the accounting period. (Note that, for stations other than those carried on a part-time basis due to lack of activated channel capacity, actual multiplication is not necessary since the DSE will always be the same as the type value.)

SPECIAL FORMULA: FOR STATIONS LISTED IN SPACE I OF SA3 (JNG FORM)

Step 1: For each station, calculate the number of programs that, during the accounting period, were broadcast live by the station; and were substituted for programs deleted at the option of the cable system.

(These are programs for which you have entered "Y" in column 2 and "P" in column 7 of space I.)

Step 2: Divide the result of step 1 by the total number of days in the calendar year (365—or 366 in a leap year). This gives you the particular station's DSE for the accounting period.

TOTAL OF DSEs

In part 5 of this Schedule you are asked to add up the DSEs for all of the distant television stations your cable system carried during the accounting period. This is the total sum of all DSEs computed by the basic formula and by the special formula.

• If the total is 1.0 or less, complete parts 6 and 7 of the DSE Schedule, as applicable, and leave parts 8 and 9 blank.

• If the total is more than 1.0, complete parts 6 and 7 of the DSE Schedule, as applicable, and complete part 8 or part 9.

THE ROYALTY FEE

The total royalty fee is determined by calculating the Minimum Fee and, if the DSEs are more than 1.0, the Base Rate Fee. In addition, cable systems located within certain television market areas may be required to calculate the 3.75 Fee and/or the Syndicated Exclusivity Charge.

The 3.75 Fee. If a cable system located in whole or in part within a television market added stations after June 24, 1981, that would not have been "permitted" under FCC rules, regulations and authorizations (hereafter referred to as "the former FCC rules") in effect on June 24, 1981, the system must compute the 3.75 fee using a formula based on the number of DSEs added. These DSEs used in computing the 3.75 Fee will not be used in computing the Base Rate Fee and Syndicated Exclusivity Charge.

The Syndicated Exclusivity Surcharge. Cable systems located in whole or in part within a major television market, as defined by FCC rules and regulations, must calculate a Syndicated Exclusivity Surcharge for the use of any commercial VHF station that places a Grade B contour, in whole or in part, over the cable system which would have been subject to FCC's syndicated exclusivity rules in effect on June 24, 1981.

The Minimum Fee/The Base Rate Fee. All cable systems filing SA3 (Long Form) must pay at least the Minimum Fee which is .893% of "gross receipts." Cable systems with a total of more than 1.0 DSE must compute the Base Rate Fee using a statutory formula based on the number of DSEs. The cable system pays either the "Minimum Fee," or the "Base Rate Fee," whichever is larger, in addition to a "3.75 Fee" and a "Syndicated Exclusivity Surcharge," as applicable.

What is a "Permitted" Station? A "permitted" station refers to a distant station whose carriage is not subject to the 3.75% Rate, but is subject to the Base Rate and, where applicable, the Syndicated Exclusivity Surcharge. A "permitted" station would include the following:

- 1) A station actually carried within any portion of a cable system prior to June 25, 1981, pursuant to the former FCC rules.
- 2) A station first carried after June 24, 1981, which could have been carried under FCC rules in effect on June 24, 1981, if such carriage would not have exceeded the market quota imposed for the importation of distant stations under those rules.
- 3) A station of the same type substituted for a carried network, noncommercial educational, or regular independent station for which a quota was or would have been imposed under FCC rules (47 CFR 76.69 (b),(c), 76.61 (b),(c),(d), and 76.73 (a) [referring to 76.61 (b),(d)] in effect on June 24, 1981.
- 4) A station carried pursuant to an individual waiver granted between April 16, 1976, and June 25, 1981 under the FCC rules and regulations in effect on April 15, 1976.
- 5) In the case of a station carried prior to June 25, 1981, on a parttime and/or substitute basis only, that fraction of the current DSE represented by prior carriage.

NOTE: If your cable system carried a station which you believe qualifies as a "permitted" station but does not fall into one of the above categories, please attach written documentation to the Statement of Account detailing the basis for its classification.

Substitution of Grandfathered Stations. Under section 76.65 of the former FCC rules, a cable system was not required to delete any station that it was authorized to carry or was lawfully carrying prior to March 31, 1972, even if the total number of distant stations carried exceeded the market quota imposed for the importation of distant stations. Carriage of these "grandfathered" stations is not subject to the 3.75% Rate, but is subject to the Base Rate, and where applicable, the Syndicated Exclusivity Surcharge. The Copyright Royalty Tribunal has stated its view that, since section 76.65 of the former FCC rules would not have permitted substitution of a grandfathered station, the 3.75% Rate applies to a station substituted for a grandfathered station if carriage of the station exceeds the market quota imposed for the importation of distant stations.

COMPUTING THE 3.75% RATE—PART 6 OF THE DSE SCHEDULE

• Determine which distant stations were carried by the system pursuant to former FCC rules in effect on June 24, 1981.

• Identify any station carried prior to June 25, 1981, on a substitute and/or part-time basis only and complete the log to determine the portion of the DSE exempt from the 3.75% Rate.

• Subtract the number of DSEs resulting from this carriage from the number of DSEs reported in part 5 of the DSE Schedule. This is the total number of DSEs subject to the 3.75% Rate. Multiply these DSEs x gross receipts x .0375. This is the 3.75 Fee.

COMPUTING THE SYNDICATED EXCLUSIVITY SURCHARGE—PART 7 OF THE DSE SCHEDULE

• Determine if any portion of the cable system is located within a top 100 major television market as defined by the FCC rules and regulation in effect on June 24, 1981. If no portion of the cable system is located in a major television market, part 7 does not have to be completed.

• Determine which station(s) reported in block B, part 6 is a commercial VHF station and places a Grade B contour in whole, or in part, over the cable system. If none of these stations are carried part 7 does not have to be completed.

• Determine which of those stations reported in block b, part 7 of the DSE Schedule were carried before March 31, 1972. These stations are exempt from the FCC's syndicated exclusivity rules in effect on June 24, 1981. If you qualify to calculate the royalty fee based upon the carriage of partially-distant stations, and you elect to do so, you must compute the surcharge in part 9 of this Schedule.

• Subtract the exempt DSEs from the number of DSEs determined in block B of part 7. This is the total number of DSEs subject to the Syndicated Exclusivity Surcharge.

• Compute the Syndicated Exclusivity Surcharge based upon these DSEs and the appropriate formula for the system's market position.

Note: The formula for computing the Syndicated Exclusivity Surcharge is structured to apply to a DSE of greater than 1.0. If the DSE is less than 1.0, multiply the "gross receipts" x .003 or .00599 (as applicable) x the DSE.

COMPUTATION OF COPYRIGHT ROYALTY FEE—PART 9 OF DSE SCHEDULE

Determine whether any of the stations you carried were "partially-distant"—that is, whether you retransmitted the signal of one or more stations to subscribers located within the station's local service area and, at the same time, to other subscribers located outside that area.

If none of the stations were "partially-distant," calculate your Base Rate Fee according to the following rates—for the system's permitted DSEs as reported in block B, part 6 or from part 5, whichever is applicable.

First DSE .863% of "gross receipts"
Each of the second, third, and fourth DSEs .563% of "gross receipts"
The fifth and each additional DSE .265% of "gross receipts"

PARTIALLY-DISTANT STATIONS—PART 9 OF THE DSE SCHEDULE

If any of the stations were "partially-distant":

1. Divide all of your subscribers into "subscriber groups" depending on their location. A particular "subscriber group" consists of all subscribers who are "distant" with respect to exactly the same complement of stations.

2. Identify the communities/areas represented by each subscriber group.

3. For each "subscriber group," calculate the total number of DSEs of that group's complement of stations.

If your system is located wholly outside all major and smaller television markets, give each station's DSEs as you gave them in parts 2, 3, and 4 of the Schedule; or

If any portion of your system is located in a major or smaller television market, give each station's DSE as you gave it in block B, part 6 of this Schedule.

4. Determine the portion of the total "gross receipts" you reported in

space K (page 7) that is attributable to each "subscriber group."

5. Calculate a separate Base Rate Fee for each "subscriber group," using (1) the rates given above; (2) the total number of DSEs for that group's complement of stations; and (3) the amount of "gross receipts" attributable to that group.

6. Add together the Base Rate Fees for each "subscriber group" to determine the system's total Base Rate Fee.

7. If any portion of the cable system is located in whole or in part within a major television market, you may also need to complete part 9, block B of the Schedule to determine the Syndicated Exclusivity Surcharge.

What To Do If You Need More Space on the DSE Schedule. There are no printed continuation sheets for the Schedule. In most cases the blanks provided should be large enough for the necessary information. If you need more space in a particular part, make a photocopy of the page in question (identifying it as a "Continuation Sheet"), enter the additional information on that copy, and attach it to the DSE Schedule.

Rounding Off DSEs. In computing DSEs on the DSE Schedule, you may round off to no less than the third decimal point. If you round off a DSE in any case, you must round off DSEs throughout the Schedule as follows:

• When the fourth decimal point is 1, 2, 3, or 4 the third decimal remains unchanged—(example: .34547 is rounded to .345)

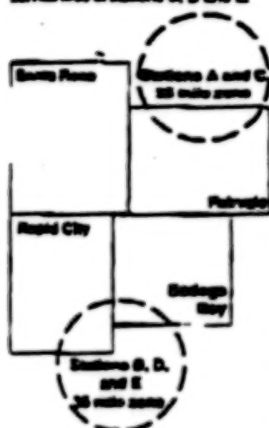
• When the fourth decimal point is 5, 6, 7, 8 or 9 the third decimal is rounded up—(example: .34551 is rounded to .347)

The example below is intended to supplement the instructions for calculating only the Base Rate Fee for "partially-distant" stations. The cable system would also be subject to the Syndicated Exclusivity Surcharge for "partially-distant" stations, if any portion is located within a major television market.

EXAMPLE:

COMPUTATION OF COPYRIGHT ROYALTY FEE FOR CABLE SYSTEM CARRYING "PARTIALLY-DISTANT" STATIONS

In most cases under current FCC rules all of a station's signal is within the local service area of both stations A and C and all of Rapid City and Bodega Bay would be within the local service area of stations B, D and E.



STATION	DSE	Identification of Subscriber Groups	"GROSS RECEIPTS" FROM SUBSCRIBERS
A (Independent)	1.0	OUTSIDE LOCAL SERVICE AREA OF Stations A, B, C, D, E	\$110,000.00
B (Independent)	1.0	Stations A and C	80,000.00
C (part-time)	.083	Stations A and C	40,000.00
D (part-time)	.139	Stations B, D, and E	70,000.00
E (network)	.25		
TOTAL DSEs	2.472	TOTAL "GROSS RECEIPTS"	\$300,000.00

Minimum Fee Total "Gross Receipts"	\$300,000.00
	x .00863
	\$ 2,679.00

First Subscriber Group (Santa Rosa)	Second Subscriber Group (Rapid City and Bodega Bay)	Third Subscriber Group (Fairvale)
"Gross Receipts" \$110,000.00	"Gross Receipts" \$120,000.00	"Gross Receipts" \$70,000.00
DSEs 2.472	DSEs 1.083	DSEs 1.389
Base Rate Fee \$1,893.91	Base Rate Fee \$1,127.67	Base Rate Fee \$778.40
\$110,000 x .00863 x 1.0 = \$949.30	\$120,000 x .00863 x 1.0 = \$1,035.60	\$70,000 x .00863 x 1.0 = \$604.10
\$110,000 x .00563 x 1.472 = \$911.61	\$120,000 x .00563 x .083 = \$54.07	\$70,000 x .00563 x .389 = \$153.30
Base Rate Fee \$1,893.91	Base Rate Fee \$1,127.67	Base Rate Fee \$778.40

Total Base Rate Fee: \$1,893.91 + \$1,127.67 + \$778.40 = \$3,799.98

In this example the cable system would pay the Base Rate Fee because it is larger than the Minimum Fee, and would enter \$3,799.98 in space L, block A, line 1, (page 7) to be added with the 3.75 fee and surcharge, if applicable, to determine its total Copyright Royalty Fee.

1 Owner	LEGAL NAME OF OWNER OF CABLE SYSTEM SAINT CROIX CABLE TV 003842	ACCOUNTING PERIOD 96/2																								
2 Computation of DSEs for Category "O" Stations	INSTRUCTIONS: In the column headed "Call Sign": list the call signs of all distant stations identified by the letter "O" in column 5 of space G (page 3). In the column headed "DSE": for each independent station, give the DSE as "1.0"; for each network or noncommercial educational station, give the DSE as ".25."																									
	CATEGORY "O" STATIONS: DSEs																									
	<table border="1"> <thead> <tr> <th>CALL SIGN</th> <th>DSE</th> <th>CALL SIGN</th> <th>DSE</th> <th>CALL SIGN</th> <th>DSE</th> </tr> </thead> <tbody> <tr> <td>WTBS</td> <td>1.0</td> <td>WRAL</td> <td>.25</td> <td></td> <td></td> </tr> <tr> <td>WGN</td> <td>1.0</td> <td>WNBC</td> <td>.25</td> <td></td> <td></td> </tr> <tr> <td>WOR</td> <td>1.0</td> <td></td> <td></td> <td></td> <td></td> </tr> </tbody> </table>	CALL SIGN	DSE	CALL SIGN	DSE	CALL SIGN	DSE	WTBS	1.0	WRAL	.25			WGN	1.0	WNBC	.25			WOR	1.0					
	CALL SIGN	DSE	CALL SIGN	DSE	CALL SIGN	DSE																				
WTBS	1.0	WRAL	.25																							
WGN	1.0	WNBC	.25																							
WOR	1.0																									
SUM OF DSEs OF CATEGORY "O" STATIONS: • Add the DSEs of each station. Enter the sum here and in line 1 of part 5 of this Schedule.		<div style="border: 1px solid black; padding: 5px; display: inline-block;">3.50</div>																								

LEGAL NAME OF OWNER OF CABLE SYSTEM:

SAINT CROIX CABLE TV 003842

Name

INSTRUCTIONS FOR COMPUTATION OF DSEs FOR STATIONS CARRIED PART-TIME DUE TO LACK OF ACTIVATED CHANNEL "CAPACITY"**3**Computation of
DSEs for
Category
"LAC" Stations

Column 1: List the call sign of all distant stations identified by "LAC" in column 5 of space G (page 3).
 Column 2: For each station, give the number of hours your cable system carried the station during the accounting period. This figure should correspond with the information given in space J. Calculate only one DSE for each station.
 Column 3: For each station, give the total number of hours that the station broadcast over the air during the accounting period.
 Column 4: Divide the figure in column 2 by the figure in column 3, and give the result in decimals in column 4. This figure must be carried out at least to the third decimal point. This is the "basis of carriage value" for the station.
 Column 5: For each independent station give the "type-value" as "1.0." For each network or noncommercial educational station, give the "type-value" as ".25."
 Column 6: Multiply the figure in column 4 by the figure in column 5, and give the result in column 6. Round to no less than the third decimal point. This is the station's "DSE." (For more information on rounding, see page (vii) of the General Instructions.)

CATEGORY "LAC" STATIONS: COMPUTATION OF DSEs

1. CALL SIGN	2. NUMBER OF HOURS CARRIED BY SYSTEM	3. NUMBER OF HOURS STATION ON AIR	4. BASIS OF CARRIAGE VALUE	5. TYPE VALUE	6. DSE

SUM OF DSEs OF CATEGORY "LAC" STATIONS:

Add the DSEs of each station.

Enter the sum here and in line 2 of part 5 of this Schedule.

-0-

INSTRUCTIONS FOR COMPUTATION OF DSEs FOR SUBSTITUTE-BASIS STATIONS:**4**Computation of
DSEs for
Substitute-
Basis Stations

Column 1: Give the call sign of each station listed in space I (page 5, the Log of Substitute Programs) if that station:
 • Was carried by your system in substitution for a program that your system was permitted to delete under FCC rules and regulations in effect on October 19, 1976 (as shown by the letter "P" in column 7 of space I); and
 • Broadcast one or more live, nonnetwork programs during that optional carriage (as shown by the word "Yes" in column 2 of space I).
 Column 2: For each station give the number of live, nonnetwork programs carried in substitution for programs that were deleted at your option. This figure should correspond with the information in space I.
 Column 3: Enter the number of days in the calendar year: 365, except in a leap year.
 Column 4: Divide the figure in column 2 by the figure in column 3, and give the result in column 4. Round to no less than the third decimal point. This is the station's "DSE." (For more information on rounding, see page (vii) of the General Instructions.)

SUBSTITUTE-BASIS STATIONS: COMPUTATION OF DSEs

1. CALL SIGN	2. NUMBER OF PROGRAMS	3. NUMBER OF DAYS IN YEAR	4. DSE	1. CALL SIGN	2. NUMBER OF PROGRAMS	3. NUMBER OF DAYS IN YEAR	4. DSE

SUM OF DSEs OF SUBSTITUTE-BASIS STATIONS:

Add the DSEs of each station.

Enter the sum here and in line 3 of part 5 of this Schedule.

-0-

TOTAL NUMBER OF DSEs: Give the amounts from the boxes in parts 2, 3, and 4 of this Schedule, and add them to provide the total number of DSEs applicable to your system.

5Total Number
of DSEs

1. Number of DSEs from part 2 3.50
 2. Number of DSEs from part 3 -0-
 3. Number of DSEs from part 4 -0-

TOTAL NUMBER OF DSEs

3.50

Name 6 computation of 3.75 Fee	LEGAL NAME OF OWNER OF CABLE SYSTEM SAINT CROIX CABLE TV 003842																																																												
INSTRUCTIONS: Block A must be completed. In block A: • If your answer is "Yes", leave the remainder of part 6 and part 7 of this DSE Schedule blank and complete part 8, (page 16) of the Schedule. • If your answer is "No", complete blocks B and C below.																																																													
BLOCK A: TELEVISION MARKETS																																																													
Is the "cable system" located wholly outside of all major and smaller markets as defined under section 78.3 of FCC rules and regulations in effect on June 24, 1981? <input type="checkbox"/> Yes—Complete part 8 of the Schedule—DO NOT COMPLETE THE REMAINDER OF PART 6 AND 7. <input type="checkbox"/> No—Complete blocks B and C below.																																																													
BLOCK B: CARRIAGE OF PERMITTED DSEs																																																													
Column 1: CALL SIGN	List the call signs of distant stations listed in part 2, 3, and 4 of this Schedule that your system was "permitted" to carry under FCC rules and regulations prior to June 25, 1981. (Note: for further explanation of "permitted station" see instructions for the DSE Schedule.)																																																												
Column 2: BASIS OF PERMITTED CARRIAGE	Enter the appropriate letter indicating the basis on which you carried a "permitted station". (Note the FCC rules and regulations cited below pertain to those in effect on June 24, 1981.) A Stations carried pursuant to the FCC "market quota" rules (78.57, 78.59(b), 78.61(b)(c), 78.63(a) referring to 78.61(b)(c)) B Specialty Station as defined in 78.50(h) (78.59(d)(1), 78.61(e)(1), 78.63(a) referring to 78.61(e)(1)) C Noncommercial Educational Station (78.59(c), 78.61(d), 78.63(a) referring to 78.61(d)) D Grandfathered Station (78.65) (see paragraph regarding Substitution of Grandfathered Stations in the instructions for DSE Schedule). E Carried pursuant to individual waiver of FCC rules (78.7) F A station previously carried on a part-time or substitute basis prior to June 25, 1981 G Commercial UHF Station within Grade-B contour (78.59(d)(5), 78.61(e)(5), 78.63(a) referring to 78.61(e)(5))																																																												
Column 3:	List the DSE for each distant station listed in parts 2, 3, and 4 of the Schedule. (Note: For those stations identified by the letter "F" in column 2, you must complete the worksheet on page 14 of this Schedule to determine the DSE.)																																																												
<table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 25%;">1. CALL SIGN</th> <th style="width: 25%;">2. PERMITTED BASIS</th> <th style="width: 25%;">3. DSE</th> </tr> </thead> <tbody> <tr> <td>WTBS</td> <td>A</td> <td>1.0</td> </tr> <tr> <td>WRAL</td> <td>A</td> <td>.25</td> </tr> <tr> <td>WNBC</td> <td>A</td> <td>.25</td> </tr> <tr><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td></tr> </tbody> </table>	1. CALL SIGN	2. PERMITTED BASIS	3. DSE	WTBS	A	1.0	WRAL	A	.25	WNBC	A	.25																			<table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 25%;">1. CALL SIGN</th> <th style="width: 25%;">2. PERMITTED BASIS</th> <th style="width: 25%;">3. DSE</th> </tr> </thead> <tbody> <tr><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td></tr> </tbody> </table>	1. CALL SIGN	2. PERMITTED BASIS	3. DSE																											
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* SUM OF PERMITTED DSEs—add the DSEs of each station 1.50																																																													
BLOCK C: COMPUTATION OF 3.75 FEE																																																													
Line 1: Enter the total number of DSEs from part 5 of this Schedule. 3.50																																																													
Line 2: Enter the "SUM OF PERMITTED DSEs" from block B above 1.50																																																													
Line 3: Subtract line 2 from line 1. This is the total number of DSEs subject to the 3.75 rate. (If zero, leave lines 4-7 blank and proceed to part 7 of this Schedule) 2.00																																																													
Line 4: Enter "Gross Receipts" from space K (page 7) \$ 710,577.79																																																													
Line 5: Multiply line 4 by .0375 and enter sum here \$ 26,646.67																																																													
Line 6: Enter total number of DSEs from line 3 2.00																																																													
Line 7: Multiply line 5 by line 6 and enter here and on line 2, block 4, space L (page 7) \$ 53,293.34																																																													

Workshop

[illegible][illegible][illegible]

7

Computation of the Syndicated Exclusivity Surcharge

Name SAINT CROIX CABLE TV 003842	LEGAL NAME OF OWNER OF CABLE TV
---------------------------------------------------	----------------------------------------

7

Computation of the Syndicated Exclusivity Surcharge

BLOCK D: COMPUTATION OF THE SYNDICATED EXCLUSIVITY SURCHARGE

Section 1. Enter the amount of "Gross Receipts" from space K (page 7) \$ _____

Section 2.

A. Enter the Total DSEs from Block B _____

B. Enter the total number of exempt DSEs from Block C _____

C. Subtract line B from line A and enter here. This is the total number of DSEs subject to the surcharge computation. If zero, proceed to part 8.

* Is any portion of the cable system within a top 50 television market as defined by the FCC?
☐ Yes—Complete section 3 below. ☐ No—Complete section 4 below.

SECTION 3: TOP 50 TELEVISION MARKET

Section 3a. Did your cable system retransmit the signals of any partially-distant television stations during the accounting period?
☐ Yes—Complete part 9 of this Schedule. ☐ No—Complete the applicable section below.

If the figure in section 2 is 4,000 or less, compute your surcharge here and leave section 3b blank.

A. Enter .00588 of "gross receipts" (the amount in section 1) \$ _____
B. Enter .00377 of "gross receipts" (the amount in section 1) \$ _____
C. Subtract 1,000 from total permitted DSEs (the figure on line C in section 2) and enter here _____
D. Multiply line B by line C and enter here _____
E. Add lines A and D. This your surcharge.
 Enter here and on line 3 of block 4 in space L (page 7)
Syndicated Exclusivity Surcharge

*If the total DSE is less than 1,000 see the note on page 10 of the DSE instructions for computing the surcharge, part 7.

Section 3b. If the figure in section 2 is more than 4,000, compute your surcharge here and leave section 3a blank.

A. Enter .00588 of "gross receipts" (the amount in section 1) \$ _____
B. Enter .00377 of "gross receipts" (the amount in section 1) \$ _____
C. Multiply line B by 3,000 and enter here \$ _____
D. Enter .00178 of "gross receipts" (the amount in section 1) \$ _____
E. Subtract 4,000 from total DSEs (the figure on line C in section 2) and enter here _____
F. Multiply line D by line E and enter here \$ _____
G. Add lines A, C, and F. This is your surcharge.
 Enter here and on line 3, block 4, space L (page 7)
Syndicated Exclusivity Surcharge

SECTION 4: SECOND 50 TELEVISION MARKET

Section 4a. Did your cable system retransmit the signals of any partially-distant television stations during the accounting period?
☐ Yes—Complete part 9, of the Schedule. ☐ No—Complete the following sections.

If the figure in section 2 is 4,000 or less, compute your surcharge here and leave section 4b blank.

A. Enter .00300 of "gross receipts" (the amount in section 1) \$ _____
B. Enter .00188 of "gross receipts" (the amount in section 1) \$ _____
C. Subtract 1,000 from total permitted DSEs (the figure on line C in section 2) and enter here _____
D. Multiply line B by line C and enter here \$ _____
E. Add lines A and D. This your surcharge.
 Enter here and in line 3, block 4, space L (page 7)
Syndicated Exclusivity Surcharge

*If the total DSE is less than 1,000 see the note on page 10 of the DSE instructions for computing the surcharge, part 7.

SAINT CROIX CABLE TV 003842

Norma

If the figure in section 2 is more than 4,000, compute your surcharge here and leave section 4a blank.

A. Enter 00300 of "gross receipts" (the amount in section 1) \$

B. Enter .00185 of "gross receipts" (the amount in section 1) \$

C. Multiply line B by 3.000 and enter here \$

D. Enter .00089 of "gross receipts" (the amount in section 1).....\$

E. Subtract 4,000 from the total DSEs (the figure on line C in section 2) and enter here: 10,000

F. Multiply line D by line E and enter here \$

G. Add lines A, C, and F. This is your surcharge.
Enter here and on line 3, block 4, space L (page 7)

Syndicated Exclusivity Surcharge

7

Computation of the Syndicated Exclusivity Surcharge

You must complete this part of the DSE Schedule if the total number of DSEs you entered in block B, part 6 is more than 1.0; however, if block A of part 6 was checked "yes," use the total number of DSEs from part 5.

- In block A, indicate, by checking "Yes" or "No," whether your system carried any partially-distant stations.
- If your answer is "No," compute your system's Base Rate Fee in block B. Leave part B blank.
- If your answer is "Yes" (that is, if you carried one or more partially-distant stations), you must complete part B. Leave block B below blank.

What is a "partially-distant station"? A station is "partially-distant" if, at the time your system carried it, some of your subscribers were located within that station's local service area and others were located outside that area. For the definition of a station's "local service area," see the "Distant Station" section on page (iv) of the General Instructions.

8

Computation of Base Rate Fee

Did your cable system retransmit the signals of any partially-distant television stations during the accounting period?

☐ Yes—Complete part 9 of this Schedule. ☒ No—Complete the following sections.

1 Enter the amount of "gross receipts from space K (page 7) \$ 710,577.79

Enter the total number of permitted DSEs from block 8, part 6 of this Schedule.
(If block A of part 6 was checked "yes," use the total number of DSEs from part 5.) 1.50

If the figure in section 2 is 4,000 or less, compute your Base Rate Fee here and leave section 4 blank.

A. Enter .0000 of "gross receipts" (the amount in section 1) \$ 6,345.46

B. Enter .00563 of "gross receipts" (the amount in section 1) 4,000.55

C. Subtract 1,000 from total DSEs (the figure in section 2) and enter here .50

D. Multiply line B by line C and enter here \$ 2,000.28

E. Add lines A, and D. This is your Base Rate Fee. Enter here and in block 3, space L (page 7)

Base Rate Fee \$ 8,349

8,345.74

SAINT CROIX CABLE TV 003842

Computation of Base Rate Fee

4

If the figure in section 2 is more than 4,000, compute your Base Rate Fee here and leave section 3 blank.

- A. Enter .00893 of "gross receipts" (the amount in section 1) \$
- B. Enter .00563 of "gross receipts" (the amount in section 1) \$
- C. Multiply line B by 3.000 and enter here \$
- D. Enter .00285 of "gross receipts" (the amount in section 1) \$
- E. Subtract 4.000 from total DSEs (the figure in section 2) and enter here
- F. Multiply line D by line E and enter here \$
- G. Add lines A, C, and F. This is your Base Rate Fee. Enter here and in block 3, space L (page 7)
Base Rate Fee \$

Computation
 of
 Base Rate For
 and
 Syndicated
 Exclusivity
 Subcharge
 of
 Priority
 District
 Stations

In General: If any of the stations you carried was "partially-distant," the statute allows you, in computing your Base Rate Fee, to exclude receipts from subscribers located within the station's local service area from your system's total "gross receipts." To take advantage of this exclusion, you must

First: Divide all of your subscribers into "subscriber groups," each group consisting entirely of subscribers that are "distinct" to the same station or the same group of stations.

Next: Treat each subscriber group as if it were a separate cable system. Determine the number of DSEs and the portion of your system's "gross receipts" attributable to that group, and calculate a separate Base Rate Fee for each group.

Finally: Add up the separate Base Rate Fees for each subscriber group. That total is the Base Rate Fee for your system.

Important: If any portion of your cable system is located within the top 100 television market and the station is not exempt, you must also compute a Syndicated Exclusivity Surcharge for each subscriber group. In this case, complete both block A and B below. However, if your cable system is wholly located outside all major television markets, complete block A only.

How to Identify a Subscriber Group

Step 1: Determine the local service area of each wholly-distant and each partly-distant station you carried.

Step 2: For each wholly-distant and each partially-distant station you carried, determine which of your subscribers were located outside the station's local service area. A subscriber located outside the local service area of a station is "distant" to that station (and, by the same token, the station is "distant" to the subscriber.)

Step 2: Divide your subscribers into subscriber groups according to the complement of stations to which they are "distant." Each subscriber group must consist entirely of subscribers who are "distant" to exactly the same complement of stations. Note that a cable system will have only one subscriber group when the distant stations it carries have local service areas that coincide.

Computing the Base Rate Fee for each subscriber group: Block A contains separate sections, one for each of your system's subscriber groups.

in each section:

- Identify the communities/areas represented by each subscriber group.
- Give the call sign for each of the stations in the subscriber group's complement—that is, each station that is "data" to all of the subscribers in the group.
- If:
 - 1) your system is located wholly outside all major and smaller television markets, give each station's DSE as you gave it in parts 2, 3, and 4 of this Schedule; or,
 - 2) any portion of your system is located in a major or smaller television market, give each station's DSE as you gave it in block 8, part 6 of this Schedule.
- Add the DSEs for each station. This gives you the total DSEs for the particular subscriber group.
- Calculate "gross receipts" from the subscriber group. For further explanation of "gross receipts" see page (vi) of the General Instructions.
- Compute a Base Rate Fee for each subscriber group using the formula outline in block 9 of part 9 of this Schedule on the preceding page. In making this computation, use the DSE and "gross receipts" figure applicable to the particular subscriber group (that is, the total DSEs for that group's complement of stations and total "gross receipts" from the subscribers in that group). You do not need to show your actual calculations on the form. For each subscriber group with less than 1,000 DSE use the following formula to compute the Base Rate Fee: "Gross Receipts" x .00883 x Total DSEs for that Subscriber Group = Base Rate Fee.

LEGAL NAME OF OWNER OF CABLE SYSTEM SAINT CROIX CABLE TV 003842								Name				
BLOCK A: COMPUTATION OF BASE RATE FEES FOR EACH SUBSCRIBER GROUP										9 Computation of Base Rate Fee and Syndicated Exclusivity Surcharge for Partially-Distant Stations		
FIRST SUBSCRIBER GROUP					SECOND SUBSCRIBER GROUP							
COMMUNITY/ AREA					COMMUNITY/ AREA							
CALL SIGN		DSE		CALL SIGN		DSE		CALL SIGN			DSE	
"Total DSEs"					"Total DSEs"							
"Gross Receipts" First Group \$					"Gross Receipts" Second Group \$							
Base Rate Fee First Group \$					Base Rate Fee Second Group \$							
THIRD SUBSCRIBER GROUP					FOURTH SUBSCRIBER GROUP							
COMMUNITY/ AREA					COMMUNITY/ AREA							
CALL SIGN		DSE		CALL SIGN		DSE		CALL SIGN		DSE		
"Total DSEs"					"Total DSEs"							
"Gross Receipts" Third Group \$					"Gross Receipts" Fourth Group \$							
Base Rate Fee Third Group \$					Base Rate Fee Fourth Group \$							
Base Rate Fee: Add the Base Rate Fees for each subscriber group as shown in the boxes above. Enter here and in block 3, space L (page 7) \$												

Name 9 Computation of Base Rate Fee and Syndicated Exclusivity Surcharge for Partially-Distant Stations	LEGAL NAME OF OWNER OF CABLE SYSTEM SAINT CROIX CABLE TV 003842								
BLOCK B: COMPUTATION OF SYNDICATED EXCLUSIVITY SURCHARGE FOR EACH SUBSCRIBER GROUP									
If your cable system is located within a top 100 television market and the station is not exempt, you must also compute a Syndicated Exclusivity Surcharge. Indicate which major television market any portion of your cable system is located in as defined by section 78.5 of FCC rules in effect on June 24, 1981:									
<input type="checkbox"/> First 50 major television market <input type="checkbox"/> Second 50 major television market									
INSTRUCTIONS: Step 1: In line 1, give the total DSEs by subscriber group for commercial VHF Grade B contour stations listed in block A, part 9 of this Schedule. Step 2: In line 2 give the total number of DSEs by subscriber group for the VHF Grade B contour stations that were classified as "Exempt DSEs" in block C, part 7 of this Schedule. If none enter zero. Step 3: In line 3 subtract line 2 from line 1. This is the total number of DSEs used to compute the surcharge. Step 4: Compute the surcharge for each subscriber group using the formula outlined in block D, section 3 or 4 of part 7 of this Schedule. In making this computation use "Gross Receipts" figures applicable to the particular group. You do not need to show your actual calculations on this form.									
NOTE: If a subscriber group has less than 1.00 DSE, use the following formula to compute the surcharge. Top 50 Television Market— $\text{"Gross Receipts"} \times .00500 \times \text{Surcharge DSEs for the Subscriber Group} = \text{Syndicated Exclusivity Surcharge}$. Second 50 Television Market— $\text{"Gross Receipts"} \times .003 \times \text{Surcharge DSEs for the Subscriber Group} = \text{Syndicated Exclusivity Surcharge}$.									
<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <th style="width: 50%;">FIRST SUBSCRIBER GROUP</th> <th style="width: 50%;">SECOND SUBSCRIBER GROUP</th> </tr> <tr> <td> Line 1: Enter the VHF DSEs Line 2: Enter the "Exempt DSEs" Line 3: Subtract line 2 from line 1 and enter here. This is the total number of DSEs for this subscriber group subject to the surcharge computation SYNDICATED EXCLUSIVITY SURCHARGE First Group \$ </td> <td> Line 1: Enter the VHF DSEs Line 2: Enter the "Exempt DSEs" Line 3: Subtract line 2 from line 1 and enter here. This is the total number of DSEs for this subscriber group subject to the surcharge computation SYNDICATED EXCLUSIVITY SURCHARGE Second Group \$ </td> </tr> <tr> <th>THIRD SUBSCRIBER GROUP</th> <th>FOURTH SUBSCRIBER GROUP</th> </tr> <tr> <td> Line 1: Enter the VHF DSEs Line 2: Enter the "Exempt DSEs" Line 3: Subtract line 2 from line 1 and enter here. This is the total number of DSEs for this subscriber group subject to the surcharge computation SYNDICATED EXCLUSIVITY SURCHARGE Third Group \$ </td> <td> Line 1: Enter the VHF DSEs Line 2: Enter the "Exempt DSEs" Line 3: Subtract line 2 from line 1 and enter here. This is the total number of DSEs for this subscriber group subject to the surcharge computation SYNDICATED EXCLUSIVITY SURCHARGE Fourth Group \$ </td> </tr> </table>		FIRST SUBSCRIBER GROUP	SECOND SUBSCRIBER GROUP	Line 1: Enter the VHF DSEs Line 2: Enter the "Exempt DSEs" Line 3: Subtract line 2 from line 1 and enter here. This is the total number of DSEs for this subscriber group subject to the surcharge computation SYNDICATED EXCLUSIVITY SURCHARGE First Group \$	Line 1: Enter the VHF DSEs Line 2: Enter the "Exempt DSEs" Line 3: Subtract line 2 from line 1 and enter here. This is the total number of DSEs for this subscriber group subject to the surcharge computation SYNDICATED EXCLUSIVITY SURCHARGE Second Group \$	THIRD SUBSCRIBER GROUP	FOURTH SUBSCRIBER GROUP	Line 1: Enter the VHF DSEs Line 2: Enter the "Exempt DSEs" Line 3: Subtract line 2 from line 1 and enter here. This is the total number of DSEs for this subscriber group subject to the surcharge computation SYNDICATED EXCLUSIVITY SURCHARGE Third Group \$	Line 1: Enter the VHF DSEs Line 2: Enter the "Exempt DSEs" Line 3: Subtract line 2 from line 1 and enter here. This is the total number of DSEs for this subscriber group subject to the surcharge computation SYNDICATED EXCLUSIVITY SURCHARGE Fourth Group \$
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SYNDICATED EXCLUSIVITY SURCHARGE: Add the surcharge for each subscriber group as shown in the boxes above. Enter here and in block 4, line 3 of space L (page 7) \$									

LEGAL NAME OF OWNER OF CABLE SYSTEM

SAINT CROIX CABLE TV 003842

Name

SECONDARY TRANSMISSION SERVICE: SUBSCRIBERS AND RATES

In General: The information in space E should cover all categories of "secondary transmission service" of the cable system; that is, the retransmission of television and radio broadcasts by your system to subscribers. Give information about other services (including pay cable) in space F, not here. All the facts you state must be those existing on the last day of the accounting period (June 30 or December 31, as the case may be).

Number of Subscribers: Both blocks in space E call for the number of subscribers to the cable system, broken down by categories of secondary transmission service. In general, you can compute the number of "subscribers" in each category by counting the number of billings in that category (the number of persons or organizations charged separately for the particular service at the rate indicated—not the number of sets receiving service).

Rate: Give the standard rate charged for each category of service. Include both the amount of the charge and the unit in which it is generally billed. (Example: "\$8/mth"). Summarize any standard rate variations within a particular rate category, but do not include discounts allowed for advance payment.

Block 1: In the left-hand block in space E, the form lists the categories of secondary transmission service that cable systems most commonly provide to their subscribers. Give the number of subscribers and rate for each listed category that applies to your system. Note: Where an individual or organization is receiving service that falls under different categories, that person or entity should be counted as a "subscriber" in each applicable category. Example: a residential subscriber who pays extra for cable service to additional sets would be included in the count under "Service to the First Set," and would be counted once again under "Service to Additional Set(s)."

Block 2: If your cable system has rate categories for secondary transmission service that are different from those printed in block 1, (for example, tiers of services which include one or more secondary transmissions), list them, together with the number of subscribers and rates, in the right-hand block. A two or three word description of the service is sufficient.

E

Secondary
transmission
Service:
Subscribers
and Rates

BLOCK 1			BLOCK 2		
CATEGORY OF SERVICE	NO. OF SUBSCRIBERS	RATE	CATEGORY OF SERVICE	NO. OF SUBSCRIBERS	RATE
Residential:					
• Service to First Set	12,716	9.90			
• Service to Additional Set(s)		-0-			
• FM Radio (if separate rate)		-0-			
Motel, Hotel					
Commercial					
Converter					
• Residential					
• Non-Residential					

SERVICES OTHER THAN SECONDARY TRANSMISSIONS: RATES

In General: Space F calls for rate (not subscriber) information with respect to all your cable system's services that were not covered in space E. That is, those services that are not offered in combination with any secondary transmission service for a single fee. There are two exceptions: you do not need to give rate information concerning: (1) services furnished at cost; and (2) services or facilities furnished to nonsubscribers. Rate information should include both the amount of the charge and the unit in which it is usually billed. If any rates are charged on a variable per-program basis, enter only the letters "PP" in the rate column.

Block 1: Give the standard rate charged by the cable system for each of the applicable services listed.

Block 2: List any services that your cable system furnished or offered during the accounting period that were not listed in block 1 and for which a separate charge was made or established. List these other services in the form of a brief (two or three word) description, and include the rate for each.

F

Services
Other Than
Secondary
Transmissions:
Rates

BLOCK 1		BLOCK 2	
CATEGORY OF SERVICE	RATE	CATEGORY OF SERVICE	RATE
Continuing Services:			
• Pay Cable	10.9		
• Pay Cable—Add'l Channel	1.00		
• Fire Protection	-0-		
• Burglar Protection	-0-		
Installation: Residential			
• First Set	33.00		
• Additional Set(s)	9.84		
• FM Radio (if separate rate)	-0-		
• Converter			
		Installation: Non-Residential	
		• Motel, Hotel	
		• Commercial	
		• Pay Cable	
		• Pay Cable—Add'l Channel	
		• Fire Protection	
		• Burglar Protection	
		Other Services:	
		• Reconnect	
		• Disconnect	
		• Outlet Relocation	
		• Move to New Address	

Narrative

LEGAL NAME OF OWNER OF CABLE SA

SAINT CROIX CABLE TV 003842

G

Primary Transmitters:
Television

INSTRUCTIONS:

General: In space G, identify every television station (including translator stations and low power television stations) carried by your cable system during the accounting period, except: (1) stations carried only on a part-time basis under FCC rules and regulations in effect on June 24, 1981 permitting the carriage of certain network programs [sections 76.59(d)(2) and (4), 76.61(e)(2) and (4) or 76.63 (referring to 76.61(e)(2) and (4))]; and (2) certain stations carried on a substitute program basis, as explained in the next paragraph.

Substitute Basis Stations: With respect to any distant stations carried by your cable system on a substitute program basis under specific FCC rules, regulations, or authorizations:

- Do not list the station here in space G—but do list it in space I (the Special Statement Program Log)—if the station was carried only on a substitute basis.
- List the station here, and also in space I, if the station was carried both on a substitute basis and also on some other basis. For further information concerning substitute basis stations, see page (v) of the General Instructions.

Column 1: List each station's call sign.

Column 2: Give the number of the channel on which the station's broadcasts are carried in its own community. This may be different from the channel on which your cable system carried the station.

Column 3: Indicate in each case whether the station is a network station, an independent station, or a noncommercial educational station, by entering the letter "N" (for network), "I" (for independent) or "E" (for noncommercial educational). For the meaning of these terms, see page (iv) of the General Instructions.

Column 4: If the station is "distant," enter "Yes." If not, enter "No." For explanation of what a "distant station" is, see page (iv) of the General Instructions.

Column 5: If you have entered "Yes" in column 4, you must complete column 5, stating the basis on which your cable system carried the distant station during the accounting period. Indicate by entering "LAC" if your cable system carried the distant station on a part-time basis because of lack of activated channel capacity. If you carried the channel on any other basis, enter "O". For a further explanation of these two categories, see page (iv) of the General Instructions.

Column 6: Give the location of each station. For U.S. stations, list the community to which the station is licensed by the FCC. For Mexican or Canadian stations, if any, give the name of the community with which the station is identified.

1. CALL SIGN	2. B'CAST CHANNEL NUMBER	3. TYPE OF STATION	4. DISTANT? (Yes or No)	5. BASIS OF CARRIAGE (If Distant)	6. LOCATION OF STATION
WKAQ*	2	I	No		San Juan, PR
WAPA*	4	I	No		San Juan, PR
WSVI	8	N	No		Christiansted, VI
WTJX	12	E	No		Charlotte Amalie, VI
WTBS	17	I	Yes	0	Atlanta, GA
WGN	9	I	Yes	0	Chicago, IL
WOR	9	T	Yes	0	Secaucus, NY
WRAL	5	N	Yes	0	Raleigh Durham, NC
WNBC	4	N	Yes	0	New York, NY
<p>*SPECIALTY STATION UNDER 47CFR 76.5 (kk) 1981. DUE TO FOREIGN LANGUAGE PROGRAMMING. SPECIALTY STATION AFFIDAVIT ON FILE.</p>					

**Substitute
Carrier:
Special
Statement and
Program Log**

In space 1, identify every nonnetwork television program, broadcast by a distant station, that your cable system carried on a substitute basis during the accounting period, under specific present and former FCC rules, regulations, or authorizations. For a further explanation of the programming that must be included in this log, see page (v) of the General Instructions.

• During the accounting period, did your cable system carry, on a substitute basis, any nonnetwork television program broadcast by a distant station? ☐ Yes ☐ No

2. LOG OF SUBSTITUTE PROGRAMS:

In General: List each substitute program on a separate line. Use abbreviations wherever possible, if their meaning is clear. If you need more space, please attach additional pages.

Column 1: Give the title of every nonnetwork television program ("substitute program") that, during the accounting period, was broadcast by a distant station and that your cable system substituted for the programming of another station under certain FCC rules, regulations, or authorizations. See page (v) of the General Instructions for further information. Do not use general categories like "movies" or "basketball." List specific program titles, for example, "I Love Lucy" or "NBA Basketball: 76ers vs. Bulls."

Column 2: If the program was broadcast live, enter "Yes". Otherwise enter "No".

Column 3: Give the call sign of the station broadcasting the substitute program.

Column 4: Give the broadcast station's location (the community to which the station is licensed by the FCC or, in the case of Mexican or Canadian stations, if any, the community with which the station is identified).

Column 5: Give the month and day when your system earned the substitute program. Use numerals, with the month first. Example: for May 7 give "5/7".

Column 6: State the times when the substitute program was carried by your cable system. List the times accurately, to the nearest five minutes. Example: a program carried by a system from 8:01:15 p.m. to 8:28:30 p.m. should be stated as "8:00-8:30 p.m."

Column 7: Enter the letter "R" if the listed program was substituted for programming that your system was required to delete under FCC rules and regulations in effect during the accounting period; or enter the letter "P" if the listed program was substituted for programming that your system was permitted to delete under FCC rules and regulations in effect on October 19, 1976.

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Name

LEGAL NAME OF OWNER OF CABLE SYSTEM Give the name exactly as it appears in space B, line 1, page 11

SAINT CROIX CABLE TV 003842

K**GROSS RECEIPTS**

is Receipts

Instructions: The figure you give in this space determines the form you file and the amount you pay. Enter the total of all amounts ("gross receipts") paid to your cable system by subscribers for the system's "secondary transmission service" (as identified in space E) during the accounting period. For a further explanation of how to compute this amount, see page (vi) of the General Instructions.

Gross receipts from subscribers for secondary transmission service(s) during the accounting period.

\$ 710,577.79

(Amount of "gross receipts")

IMPORTANT: You must complete a statement in space P concerning gross receipts.**L**Copyright
Royalty Fee**INSTRUCTIONS FOR COMPUTING THE COPYRIGHT ROYALTY FEE**

Use the blocks in this space L to determine the royalty fee you owe:

- Complete block 1, showing your Minimum Fee.
 - Complete block 2, showing whether your system carried any distant television stations.
 - If your system did not carry any distant television stations, leave block 3 blank. Enter the amount of the Minimum Fee from block 1 in the box in block 4, and pay that amount with your Statement of Account.
 - If your system did carry any distant television stations you must complete the applicable parts of the DSE Schedule accompanying this form and attach the Schedule to your Statement of Account.
- ▶ If the number of permitted DSEs calculated in part 6, block B or part 5 of this Schedule is 1.0 or less, leave block 3 blank, and enter the amount of the Minimum Fee, from block 1 of this space, on line 1 in block 4. If the number of DSEs is greater than 1.0, enter in block 3 the amount of the Base Rate Fee from part 8 or part 9, block A of the Schedule. On line 1 in block 4, enter whichever amount is larger: the Minimum Fee from block 1 or the Base Rate Fee from block 3.
- ▶ If part 6 of the DSE Schedule was completed, enter on line 2 in block 4 below the amount from line 7 of block C.
- ▶ If part 7 or part 9, block B, of the DSE Schedule was completed, enter on line 3 in block 4 below the surcharge amount.

Block 1 MINIMUM FEE: All cable systems with semiannual "gross receipts" of \$292,000 or more are required to pay at least the Minimum Fee, regardless of whether they carried any distant stations. This fee is .893 of one percent of the system's "gross receipts" for the accounting period.

Line 1. Enter the amount of "gross receipts" from space K. 710,577.79

Line 2. Multiply the amount in line 1 by .00893

Enter the result here.

This is your Minimum Fee. \$ 6,345.46

Block 2 DISTANT TELEVISION STATIONS CARRIED: Your answer here must agree with the information you gave in space G. If, in space G, you identified any stations as "distant" by stating "Yes" in column 4, you must check "Yes" in this block.

• Did your cable system carry any distant television stations during the accounting period?

☒ Yes—Complete the DSE Schedule. ☐ No—Leave block 3 below blank and complete line 1, block 4.

Block 3 BASE RATE FEE: Enter the Base Rate Fee from either part 8, section 3 or 4, or Part 9, block A of the DSE Schedule.

\$ 16,346.84

Block 4 Line 1. BASE RATE or MINIMUM FEE: If you did not complete block 3, enter the minimum fee from block 1. If you completed block 3, enter either the minimum fee from block 1 or the Base Rate Fee from block 3, whichever is larger.

\$ 16,346.84

Line 2. **3.75 Fee:** Enter the total fee from line 7, block C, part 6 of the DSE Schedule. If none, enter zero.

\$ 0

Line 3. **SYNDICATED EXCLUSIVITY SURCHARGE:** Enter the fee from either part 7 (block D, section 3 or 4) or part 9 (block B) of the DSE Schedule. If none, enter zero.

\$ 0

Line 4. **INTEREST CHARGE:** Enter the amount from line 4, space Q, page 9 (Interest Worksheet)

\$ 0

TOTAL ROYALTY FEE. Add Lines 1, 2, 3, and 4 and enter total here.

\$ 16,346.84

Remit this amount in the form of a certified check, cashier's check, or money order, payable to Register of Copyrights, or electronic payment. Do not send cash.

EXCEPTION: If you listed the MINIMUM FEE in line 1 do not add this figure to the Total Royalty Fee if the 3.75 fee in line 2 exceeds the MINIMUM FEE. Instead, draw a line through the MINIMUM FEE and enter the sum from the following formula: gross receipts x .00893 x total "permitted" DSEs (from part 6, block B) = Fee for line 1. However, if the total "permitted" DSEs is zero then enter .000 on line 1.

LEGAL NAME OF OWNER OF CABLE SYSTEM:

SAINT CROIX CABLE TV 003842

Name

CHANNELS

INSTRUCTIONS: You must give: (1) the number of channels on which the cable system carried television broadcast stations to its subscribers; and, (2) the cable system's total number of activated channels, during the accounting period.

M

Channels

1. Enter the total number of channels on which the cable system carried television broadcast stations.

9

2. Enter the total number of activated channels on which the cable system carried television broadcast stations and nonbroadcast services

61

INDIVIDUAL TO BE CONTACTED IF FURTHER INFORMATION IS NEEDED: (Identify an individual to whom we can write or call about this Statement of Account.)

N

Contact

Name Keith A. Kirkman

Telephone (809) 778-6701

(Area Code)

Address 4501 Estate Diamond

(Phantom, Street, P.O. Box, Apartment or Suite Number)

Christiansted, St. Croix USVI 00820

(City, Town, State, ZIP Code)

CERTIFICATION: (This Statement of Account must be certified and signed in accordance with Copyright Office Regulations, as explained in the General Instructions.)

O

Certification

• I, the undersigned, hereby certify that: (Check one, but only one, of the boxes.)

☐ Owner other than corporation or partnership) I am the owner of the cable system as identified in line 1 of space B; or☐ Agent of owner other than corporation or partnership) I am the duly authorized agent of the owner of the cable system as identified in line 1 of space B, and that the owner is not a corporation or partnership; or☒ (Officer or partner) I am an officer (if a corporation) or a partner (if a partnership) of the legal entity identified as owner of the cable system in line 1 of space B.

I have examined the Statement of Account and hereby declare under penalty of law that all statements of fact contained herein are true, complete, and correct to the best of my knowledge, information, and belief, and are made in good faith. [18 U.S.C., Section 1001(1988)]

Handwritten signature: (X).....

Typed or printed name: Keith A. Kirkman

Title: Vice President/Chief Operating Officer

(Title of official position held in corporation or partnership)

Date: February 26, 1997

Name

LEGAL NAME OF OWNER OF CABLE SYSTEM

SAINT CROIX CABLE TV 003842

PStatement of
Gross Receipts**SPECIAL STATEMENT CONCERNING GROSS RECEIPTS EXCLUSION**

The Satellite Home Viewer Act of 1988 amended Title 17, section 111(d)(1)(A), of the Copyright Act by adding the following sentence:

"In determining the total number of subscribers and the gross amounts paid to the cable system for the basic service of providing secondary transmissions of primary broadcast transmitters, the system shall not include subscribers and amounts collected from subscribers receiving secondary transmissions for private home viewing pursuant to section 119."

For more information on when to exclude these amounts, see the note on page(vi) of the General Instructions.

During the accounting period did the cable system exclude any amounts of gross receipts for secondary transmissions made by satellite carriers to satellite home "dish" owners?

☐ NO

☐ YES. Enter the total here\$
and list the satellite carrier(s) below.

Name

Mailing Address

Name

Mailing Address

Name

Mailing Address

Name

Mailing Address

QInterest
Worksheet**WORKSHEET FOR COMPUTING INTEREST**

You must complete this worksheet for those royalty payments submitted as a result of a late payment or underpayment. For an explanation of interest assessment, see page (vi) General Instructions.

Line 1. Enter the amount of late payment or underpayment\$
x%

Line 2. Multiply line 1 by the interest rate* and enter the the sum here
x days

Line 3. Multiply line 2 by the number of days late
x .00274

Line 4. Multiply line 3 by .00274** enter here and on line 4, Block 4,
space L (page 7)\$
(Interest charge)

*Contact the Licensing Division at 202-707-8150 for the interest rate for the accounting period in which the late payment or underpayment occurred.

**This is the decimal equivalent of 1/365, which is the interest assessment for one day late.

NOTE: If you are filing this worksheet covering a Statement of Account already submitted to the Copyright Office, please list below the Owner, Address, First Community Served, and Accounting Period as given in the original filing.

Owner

Address

First Community Served

Accounting Period

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54

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INSTRUCTIONS FOR DSE SCHEDULE

WHAT IS A "DSE"?

The term "distant signal equivalent" ("DSE") refers to the numerical value given by the Copyright Act to each distant television station carried by a cable system during an accounting period. Your system's total number of DSEs determines the royalty you owe.

FORMULAS FOR COMPUTING A STATION'S DSE

There are two different formulas for computing DSEs: (1) a basic formula for all distant stations listed in space G (page 3); and (2) a special formula for those stations carried on a substitute basis and listed in space I (page 5). (Note that, if a particular station is listed in both space G and space I, a DSE must be computed twice for that station: once under the basic formula and again under the special formula. However, a station's total DSE is not to exceed its full type-value. If this happens, contact the Licensing Division.)

BASIC FORMULA: FOR ALL DISTANT STATIONS LISTED IN SPACE G OF SA3 (LONG FORM)

Step 1: Determine the station's TYPE-VALUE. For purposes of computing DSEs, the Copyright Act gives different values to distant stations depending upon their type. If, as shown in space G of your Statement of Account (page 3), a distant station is:

- **INDEPENDENT:** its type-value is ▶ 1.00
- **NETWORK:** its type value is ▶ .25
- **NONCOMMERCIAL EDUCATIONAL:** its type-value is ▶ .25

Note that local stations are not counted at all in computing DSEs.

Step 2: Calculate the station's BASIS OF CARRIAGE VALUE: The DSE of a station also depends on its basis of carriage. If, as shown in space G of your Form SA3, the station was carried part-time because of lack of activated channel capacity its basis of carriage value is determined by (1) calculating the number of hours the cable system carried the station during the accounting period; and (2) dividing that number by the total number of hours the station broadcast over the air during the accounting period. The basis of carriage value for all other stations listed in space G is 1.0.

Step 3: Multiply the result of step 1 by the result of step 2. This gives you the particular station's DSE for the accounting period. (Note that, for stations other than those carried on a part-time basis due to lack of activated channel capacity, actual multiplication is not necessary since the DSE will always be the same as the type value.)

SPECIAL FORMULA: FOR STATIONS LISTED IN SPACE I OF SA3 (LONG FORM)

Step 1: For each station, calculate the number of programs that, during the accounting period, were broadcast live by the station and were substituted for programs deleted at the option of the cable system.

(These are programs for which you have entered "Ycs" in column 2 and "P" in column 7 of space I.)

Step 2: Divide the result of step 1 by the total number of days in the calendar year (365—or 366 in a leap year). This gives you the particular station's DSE for the accounting period.

TOTAL OF DSEs

In part 5 of this Schedule you are asked to add up the DSEs for all of the distant television stations your cable system carried during the accounting period. This is the total sum of all DSEs computed by the basic formula and by the special formula.

• If the total is 1.0 or less, complete parts 6 and 7 of the DSE Schedule, as applicable, and leave parts 8 and 9 blank.

• If the total is more than 1.0, complete parts 6 and 7 of the DSE Schedule, as applicable, and complete part 8 or part 9.

THE ROYALTY FEE

The total royalty fee is determined by calculating the Minimum Fee and, if the DSEs are more than 1.0, the Base Rate Fee. In addition, cable systems located within certain television market areas may be required to calculate the 3.75 Fee and/or the Syndicated Exclusivity Charge.

The 3.75 Fee, if a cable system located in whole or in part within a television market added stations after June 24, 1981, that would not have been "permitted" under FCC rules, regulations and authorizations (hereafter referred to as "the former FCC rules") in effect on June 24, 1981, the system must compute the 3.75 fee using a formula based on the number of DSEs added. These DSEs used in computing the 3.75 Fee will not be used in computing the Base Rate Fee and Syndicated Exclusivity Surcharge.

The Syndicated Exclusivity Surcharge. Cable systems located in whole or in part within a major television market, as defined by FCC rules and regulations, must calculate a Syndicated Exclusivity Surcharge for the age of any commercial VHF station that places a Grade B contour, in whole or in part, over the cable system which would have been subject to the FCC's syndicated exclusivity rules in effect on June 24, 1981.

The Minimum Fee/The Base Rate Fee. All cable systems filing SA3 (Long Form) must pay at least the Minimum Fee which is .853% of "gross receipts." Cable systems with a total of more than 1.0 DSE must compute the Base Rate Fee using a statutory formula based on the number of DSEs. The cable system pays either the "Minimum Fee," or the "Base Rate Fee," whichever is larger, in addition to a "3.75 Fee" and a "Syndicated Exclusivity Surcharge," as applicable.

What is a "Permitted" Station? A "permitted" station refers to a distant station whose carriage is not subject to the 3.75% Rate, but is subject to the Base Rate and, where applicable, the Syndicated Exclusivity Surcharge. A "permitted" station would include the following:

- 1) A station actually carried within any portion of a cable system prior to June 25, 1981, pursuant to the former FCC rules.
- 2) A station first carried after June 24, 1981, which could have been carried under FCC rules in effect on June 24, 1981, if such carriage would not have exceeded the market quota imposed for the importation of distant stations under those rules.
- 3) A station of the same type substituted for a carried network, noncommercial educational, or regular independent station for which a quota was or would have been imposed under FCC rules (47 CFR 76.69 (b),(c), 76.61 (b),(c),(d), and 76.63 (a) [referring to 76.61 (b),(d)] in effect on June 24, 1981).
- 4) A station carried pursuant to an individual waiver granted between April 15, 1976, and June 25, 1981 under the FCC rules and regulations in effect on April 15, 1976.
- 5) In the case of a station carried prior to June 25, 1981, on a part-time and/or substitute basis only, that fraction of the current DSE represented by prior carriage.

NOTE: If your cable system carried a station which you believe qualifies as a "permitted" station but does not fall into one of the above categories, please attach written documentation to the Statement of Account detailing the basis for its classification.

Substitution of Grandfathered Stations. Under section 76.65 of the former FCC rules, a cable system was not required to delete any station that it was authorized to carry or was lawfully carrying prior to March 31, 1972, even if the total number of distant stations carried exceeded the market quota imposed for the importation of distant stations. Carriage of these "grandfathered" stations is not subject to the 3.75% Rate, but is subject to the Base Rate, and where applicable, the Syndicated Exclusivity Surcharge. The Copyright Royalty Tribunal has stated its view that, since section 76.65 of the former FCC rules would not have permitted substitution of a grandfathered station, the 3.75% Rate applies to a station substituted for a grandfathered station if carriage of the station exceeds the market quota imposed for the importation of distant stations.

COMPUTING THE 3.75% RATE—PART 6 OF THE DSE SCHEDULE

• Determine which distant stations were carried by the system pursuant to former FCC rules in effect on June 24, 1981.

• Identify any station carried prior to June 25, 1981, on a substitute and/or part-time basis only and complete the log to determine the portion of the DSE exempt from the 3.75% Rate.

• Subtract the number of DSEs resulting from this carriage from the number of DSEs reported in part 5 of the DSE Schedule. This is the total number of DSEs subject to the 3.75% Rate. Multiply these DSEs x gross receipts x .0375. This is the 3.75 Fee.

COMPUTING THE SYNDICATED EXCLUSIVITY SURCHARGE—PART 7 OF THE DSE SCHEDULE

• Determine if any portion of the cable system is located within a top 100 major television market as defined by the FCC rules and regulation in effect on June 24, 1981. If no portion of the cable system is located in a major television market, part 7 does not have to be completed.

• Determine which station(s) reported in block B, part 6 is a commercial VHF station and places a Grade B contour in whole, or in part, over the cable system. If none of these stations are carried part 7 does not have to be completed.

• Determine which of those stations reported in block b, part 7 of the DSE Schedule were carried before March 31, 1972. These stations are exempt from the FCC's syndicated exclusivity rules in effect on June 24, 1981. If you qualify to calculate the royalty fee based upon the carriage of partially-distant stations, and you elect to do so, you must compute the surcharge in part 9 of this Schedule.

• Subtract the exempt DSEs from the number of DSEs determined in block B of part 7. This is the total number of DSEs subject to the Syndicated Exclusivity Surcharge.

• Compute the Syndicated Exclusivity Surcharge based upon these DSEs and the appropriate formula for the system's market position.

Note: The formula for computing the Syndicated Exclusivity Surcharge is structured to apply to a DSE of greater than 1.0. If the DSE is less than 1.0, multiply the "gross receipts" x .003 or .00599 (as applicable) x the DSE.

COMPUTATION OF COPYRIGHT ROYALTY FEE—PART 8 OF THE DSE SCHEDULE

Determine whether any of the stations you carried were "partially-distant"—that is, whether you retransmitted the signal of one or more stations to subscribers located within the station's local service area and, at the same time, to other subscribers located outside that area.

• If none of the stations were "partially-distant," calculate your Base Rate according to the following rates—for the system's permitted DSEs as reported in block B, part 6 or from part 5, whichever is applicable.

First DSE .883% of "gross receipts"
Each of the second, third, and fourth DSEs .583% of "gross receipts"
The fifth and each additional DSE .285% of "gross receipts"

PARTIALLY-DISTANT STATIONS—PART 9 OF THE DSE SCHEDULE

• If any of the stations were "partially-distant":

1. Divide all of your subscribers into "subscriber groups" depending on their location. A particular "subscriber group" consists of all subscribers who are "distant" with respect to exactly the same complement of stations.

2. Identify the communities/areas represented by each subscriber group.

3. For each "subscriber group," calculate the total number of DSEs of that group's complement of stations.

If your system is located wholly outside all major and smaller television markets, give each station's DSEs as you gave them in parts 2, 3, and 4 of the Schedule; or

If any portion of your system is located in a major or smaller television market, give each station's DSE as you gave it in block B, part 6 of this Schedule.

4. Determine the portion of the total "gross receipts" you reported in

space K (page 7) that is attributable to each "subscriber group."

5. Calculate a separate Base Rate Fee for each "subscriber group," using (1) the rates given above; (2) the total number of DSEs for that group's complement of stations; and (3) the amount of "gross receipts" attributable to that group.

6. Add together the Base Rate Fees for each "subscriber group" to determine the system's total Base Rate Fee.

7. If any portion of the cable system is located in whole or in part within a major television market, you may also need to complete part 9, block B of the Schedule to determine the Syndicated Exclusivity Surcharge.

What To Do If You Need More Space on the DSE Schedule. There are no printed continuation sheets for the Schedule. In most cases the blanks provided should be large enough for the necessary information. If you need more space in a particular part, make a photocopy of the page in question (identifying it as a "Continuation Sheet"), enter the additional information on that copy, and attach it to the DSE Schedule.

Rounding Off DSEs. In computing DSEs on the DSE Schedule, you may round off to no less than the third decimal point. If you round off a DSE in any case, you must round off DSEs throughout the Schedule as follows:

• When the fourth decimal point is 1, 2, 3, or 4 the third decimal remains unchanged—(example: .34547 is rounded to .345)

• When the fourth decimal point is 5, 6, 7, 8 or 9 the third decimal is rounded up—(example: .34551 is rounded to .346)

The example below is intended to supplement the instructions for calculating only the Base Rate Fee for "partially-distant" stations. The cable system would also be subject to the Syndicated Exclusivity Surcharge for "partially-distant" stations, if any portion is located within a major television market.

EXAMPLE:

COMPUTATION OF COPYRIGHT ROYALTY FEE FOR CABLE SYSTEM CARRYING "PARTIALLY-DISTANT" STATIONS

In most cases under copyright FCC rules all of stations within the system's service area of each station A and C and all of Rapid City and Bodega Bay would be within the same service area of stations B, D and E.



Distant Stations Carried	DSE	Identification of Subscriber Groups	"GROSS RECEIPTS" FROM SUBSCRIBERS
STATION		CITY	
A (Independent)	1.0	Santa Rosa	OUTSIDE LOCAL SERVICE AREA OF Stations A, B, C, D, E
B (Independent)	1.0	Rapid City	Stations A, B, C, D, E
C (part-time)	.083	Bodega Bay	Stations A and C
D (part-time)	.138	Farvale	Stations A and C
E (network)	.25		Stations B, D, and E
TOTAL DSEs	2.472	TOTAL "GROSS RECEIPTS"	\$300,000.00

Minimum Fee Total "Gross Receipts"	\$300,000.00 x .00883 \$ 2,679.00
------------------------------------	------------------------------------------------

First Subscriber Group (Santa Rosa)	Second Subscriber Group (Rapid City and Bodega Bay)	Third Subscriber Group (Farvale)
"Gross Receipts" \$110,000.00	"Gross Receipts" \$120,000.00	"Gross Receipts" \$70,000.00
DSEs 2.472	DSEs 1.083	DSEs 1.388
Base Rate Fee \$1,883.91	Base Rate Fee \$1,127.67	Base Rate Fee \$778.40
\$110,000 x .00883 x 1.0 = \$971.30	\$120,000 x .00883 x 1.0 = \$1,059.60	\$70,000 x .00883 x 1.0 = \$618.10
\$110,000 x .00563 x 1.472 = \$911.61	\$120,000 x .00563 x .083 = \$54.07	\$70,000 x .00563 x .389 = \$153.30
Base Rate Fee \$1,883.91	Base Rate Fee \$1,127.67	Base Rate Fee \$778.40

Total Base Rate Fee: \$1,883.91 + \$1,127.67 + \$778.40 = \$3,790.00
In this example the cable system would pay the Base Rate Fee because it is larger than the minimum fee, and would enter \$3,790.00 in space L, block 4, line 1, (page 7) to be added with the 3.75 fee and surcharge, if applicable, to determine its total Copyright Royalty Fee.

1 Owner	LEGAL NAME OF OWNER OF CABLE SYSTEM:	ACCOUNTING PERIOD 96/2				
	SAINT CROIX CABLE TV 003842					
2 Computation of DSEs for Category "O" Stations	INSTRUCTIONS:					
	In the column headed "Call Sign": list the call signs of all distant stations identified by the letter "O" in column 5 of space G (page 3).					
	In the column headed "DSE": for each independent station, give the DSE as "1.0"; for each network or noncommercial educational station, give the DSE as ".25."					
	CATEGORY "O" STATIONS: DSEs					
	CALL SIGN	DSE	CALL SIGN	DSE	CALL SIGN	DSE
	WTBS	1.0	WRAL	.25		
	WGN	1.0	WNBC	.25		
	WOR	1.0				
	SUM OF DSEs OF CATEGORY "O" STATIONS:					
	• Add the DSEs of each station.					
	Enter the sum here and in line 1 of part 5 of this Schedule.					
	3.50					

LEGAL NAME OF OWNER OF CABLE SYSTEM:

SAINT CROIX CABLE TV 003842

Name

INSTRUCTIONS FOR COMPUTATION OF DSEs FOR STATIONS CARRIED PART-TIME DUE TO LACK OF ACTIVATED CHANNEL CAPACITY

Column 1: List the call sign of all distant stations identified by "LAC" in column 5 of space G (page 3).
 Column 2: For each station, give the number of hours your cable system carried the station during the accounting period. This figure should correspond with the information given in space J. Calculate only one DSE for each station.
 Column 3: For each station, give the total number of hours that the station broadcast over the air during the accounting period.
 Column 4: Divide the figure in column 2 by the figure in column 3, and give the result in decimals in column 4. This figure must be carried out at least to the third decimal point. This is the "basis of carriage value" for the station.
 Column 5: For each independent station give the "type-value" as "1.0." For each network or noncommercial educational station, give the "type-value" as ".25."
 Column 6: Multiply the figure in column 4 by the figure in column 5, and give the result in column 6. Round to no less than the third decimal point. This is the station's "DSE." (For more information on rounding, see page (vi) of the General Instructions.)

3

 Computation of
 DSEs for
 Category
 "LAC" Stations
CATEGORY "LAC" STATIONS: COMPUTATION OF DSEs

1. CALL SIGN	2. NUMBER OF HOURS CARRIED BY SYSTEM	3. NUMBER OF HOURS STATION ON AIR	4. BASIS OF CARRIAGE VALUE	5. TYPE VALUE	6. DSE
.....
.....
.....
.....
.....
.....
.....
.....
.....
.....

SUM OF DSEs OF CATEGORY "LAC" STATIONS:

Add the DSEs of each station.

Enter the sum here and in line 2 of part 5 of this Schedule.

-0-

INSTRUCTIONS FOR COMPUTATION OF DSEs FOR SUBSTITUTE-BASIS STATIONS:

Column 1: Give the call sign of each station listed in space I (page 5, the Log of Substitute Programs) if that station:
 • Was carried by your system in substitution for a program that your system was permitted to delete under FCC rules and regulations in effect on October 18, 1976 (as shown by the letter "P" in column 7 of space I); and
 • Broadcast one or more live, nonnetwork programs during that optional carriage (as shown by the word "Yes" in column 2 of space I).
 Column 2: For each station give the number of live, nonnetwork programs carried in substitution for programs that were deleted at your option. This figure should correspond with the information in space I.
 Column 3: Enter the number of days in the calendar year: 365, except in a leap year.
 Column 4: Divide the figure in column 2 by the figure in column 3, and give the result in column 4. Round to no less than the third decimal point. This is the station's "DSE." (For more information on rounding, see page (vi) of the General Instructions.)

4

 Computation of
 DSEs for
 Substitute-
 Basis Stations
SUBSTITUTE-BASIS STATIONS: COMPUTATION OF DSEs

1. CALL SIGN	2. NUMBER OF PROGRAMS	3. NUMBER OF DAYS IN YEAR	4. DSE	1. CALL SIGN	2. NUMBER OF PROGRAMS	3. NUMBER OF DAYS IN YEAR	4. DSE
.....
.....
.....
.....
.....
.....
.....
.....
.....
.....

SUM OF DSEs OF SUBSTITUTE-BASIS STATIONS:

Add the DSEs of each station.

Enter the sum here and in line 3 of part 5 of this Schedule.

-0-

TOTAL NUMBER OF DSEs: Give the amounts from the boxes in parts 2, 3, and 4 of this Schedule, and add them to provide the total number of DSEs applicable to your system.

1. Number of DSEs from part 2 3.50
 2. Number of DSEs from part 3 -0-
 3. Number of DSEs from part 4 -0-

TOTAL NUMBER OF DSEs

3.50

5

 Total Number
 of DSEs

Name

LEGAL NAME OF OWNER OF CABLE SYSTEM: Give the name exactly as it appears in space B, line 1 (page 1).

SAINT CROIX CABLE TV 003842

6

Computation of
3.75 Fee

INSTRUCTIONS: Block A must be completed.

In block A:

- * If your answer is "Yes", leave the remainder of part 6 and part 7 of the DSE Schedule blank and complete part 8. (page 16) of the Schedule.
- * If your answer is "No", complete blocks B and C below.

BLOCK A: TELEVISION MARKETS

Is the "cable system" located wholly outside of all major and smaller markets as defined under FCC rules and regulations in effect on June 24, 1981?

- ☐ Yes—Complete part 8 of the Schedule—DO NOT COMPLETE THE REMAINDER OF PART 6 AND 7.
- ☐ No—Complete blocks B and C below.

BLOCK B: CARRIAGE OF PERMITTED DSEs

Column 1: List the call signs of distant stations listed in part 2, 3, and 4 of this Schedule that your system was "permitted" to carry under FCC rules and regulations prior to June 25, 1981. (Note: for further explanation of "permitted station" see instructions for the DSE Schedule.)

Column 2: Enter the appropriate letter indicating the basis on which you carried a "permitted station". (Note the FCC rules and regulations cited below pertain to those in effect on June 24, 1981.)

- A Stations carried pursuant to the FCC "market quota" rules (76.57, 76.59(b), 76.61(b)(c), 76.63(a) referring to 76.61(b)(c))
- B Specialty Station as defined in 76.5(kk) (76.59(d)(1), 76.61(e)(1), 76.63(a) referring to 76.61(e)(1))
- C Noncommercial Educational Station (76.59(c), 76.61(d), 76.63(a) referring to 76.61(d))
- D Grandfathered Station (76.65) (see paragraph regarding Substitution of Grandfathered Stations in the instructions for DSE Schedule).
- E Carried pursuant to individual waiver of FCC rules (76.7)
- * F A station previously carried on a part-time or substitute basis prior to June 25, 1981
- G Commercial UHF Station within Grade-B contour (76.59(d)(5), 76.61(e)(5), 76.63(a) referring to 76.61(e)(5))

Column 3: List the DSE for each distant station listed in parts 2, 3, and 4 of the Schedule. (Note: For those stations identified by the letter "F" in column 2, you must complete the worksheet on page 14 of this Schedule to determine the DSE.)

1. CALL SIGN	2. PERMITTED BASIS	3. DSE	1. CALL SIGN	2. PERMITTED BASIS	3. DSE	1. CALL SIGN	2. PERMITTED BASIS	3. DSE
WTBS	A	1.0						
WGN	A	1.0						
WOR	A	1.0						
WRAL	A	.25						
WNBL	A	.25						

* SUM OF PERMITTED DSEs—and the DSEs of each station 3.50

BLOCK C: COMPUTATION OF 3.75 FEE

Line 1: Enter the total number of DSEs from part 5 of this Schedule 3.50

Line 2: Enter the "SUM OF PERMITTED DSEs" from block B above 3.50

Line 3: Subtract line 2 from line 1. This is the total number of DSEs subject to the 3.75 rate.
(If zero, leave lines 4-7 blank and proceed to part 7 of this Schedule) 0

Line 4: Enter "Gross Receipts" from space K (page 7) \$ 710,577.79

Line 5: Multiply line 4 by .0375 and enter sum here \$ 26,646.67

Line 6: Enter total number of DSEs from line 3 0

Line 7: Multiply line 6 by line 5 and enter here and on line 2, block 4, space L (page 7) \$ 0

Name

LEGAL NAME OF OWNER OF CABLE SYSTEM Give the name exactly as it appears in space 8, line 1 (page 1).

SAINT CROIX CABLE TV 003842

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BLOCK D: COMPUTATION OF THE SYNDICATED EXCLUSIVITY SURCHARGE

Computation
of the
Syndicated
Exclusivity
Surcharge

Section 1 Enter the amount of "Gross Receipts" from space K (page 7) \$ 710,577.79

Section 2 A. Enter the Total DSEs from Block B 0

B. Enter the total number of exempt DSEs from Block C 0

C. Subtract line B from line A and enter here. This is the total number of DSEs
subject to the surcharge computation. If zero, proceed to part 8. 0* Is any portion of the cable system within a top 50 television market as defined by the FCC?
☒ Yes—Complete section 3 below. ☐ No—Complete section 4 below.

SECTION 3: TOP 50 TELEVISION MARKET

Section 3a * Did your cable system retransmit the signals of any partially-distant television stations during the accounting period?
☐ Yes—Complete part 9 of this Schedule. ☒ No—Complete the applicable section below.

If the figure in section 2 is 4,000 or less,* compute your surcharge here and leave section 3b blank.

A. Enter .00599 of "gross receipts" (the amount in section 1) \$ 4,256.36

B. Enter .00377 of "gross receipts" (the amount in section 1) \$ 2,678.88

C. Subtract 1,000 from total permitted DSEs (the figure on
line C in section 2) and enter here 0

D. Multiply line B by line C and enter here 0

E. Add lines A and D. This is your surcharge.
Enter here and on line 3 of block 4 in space L (page 7)
Syndicated Exclusivity Surcharge \$ 0

*If the total DSE is less than 1,000 see the note on page 10 of the DSE instructions for computing the surcharge, part 7.

Section 3b If the figure in section 2 is more than 4,000, compute your surcharge here and leave section 3a blank.

A. Enter .00599 of "gross receipts" (the amount in section 1) \$

B. Enter .00377 of "gross receipts" (the amount in section 1) \$

C. Multiply line B by 3,000 and enter here \$

D. Enter .00178 of "gross receipts" (the amount in section 1) \$

E. Subtract 4,000 from total DSEs (the figure on line C in section 2) and enter here \$

F. Multiply line D by line E and enter here \$

G. Add lines A, C, and F. This is your surcharge.
Enter here and on line 3, block 4, space L (page 7)
Syndicated Exclusivity Surcharge \$

SECTION 4: SECOND 50 TELEVISION MARKET

Section 4a Did your cable system retransmit the signals of any partially-distant television stations during the accounting period?
☐ Yes—Complete part 9, of the Schedule. ☐ No—Complete the following sections.

If the figure in section 2 is 4,000 or less,* compute your surcharge here and leave section 4b blank.

A. Enter .00300 of "gross receipts" (the amount in section 1) \$

B. Enter .00189 of "gross receipts" (the amount in section 1) \$

C. Subtract 1,000 from total permitted DSEs (the figure on line C in section 2)
and enter here \$

D. Multiply line B by line C and enter here \$

E. Add lines A and D. This is your surcharge.
Enter here and in line 3, block 4, space L (page 7)
Syndicated Exclusivity Surcharge \$

*If the total DSE is less than 1,000 see the note on page 10 of the DSE instructions for computing the surcharge, part 7.

LEGAL NAME OF OWNER OF CABLE SYSTEM: Give the name exactly as it appears in space B, line 1 (page 1).

SAINT CROIX CABLE TV 003842

Name

7

Computation
of the
Syndicated
Exclusivity
Surcharge

If the figure in section 2 is more than 4,000, compute your surcharge here and leave section 4a blank.

- A. Enter .00300 of "gross receipts" (the amount in section 1) \$
- B. Enter .00189 of "gross receipts" (the amount in section 1) \$
- C. Multiply line B by 3,000 and enter here \$
- D. Enter .00089 of "gross receipts" (the amount in section 1) \$
- E. Subtract 4,000 from the total DSEs (the figure on line C in section 2) and enter here \$
- F. Multiply line D by line E and enter here \$
- G. Add lines A, C, and F. This is your surcharge.
Enter here and on line 3, block 4, space L (page 7)
Syndicated Exclusivity Surcharge \$

INSTRUCTIONS:

You must complete this part of the DSE Schedule if the total number of DSEs you entered in block B, part 6 is more than 1.0; however, if block A of part 6 was checked "yes," use the total number of DSEs from part 5.

- In block A, indicate, by checking "Yes" or "No," whether your system carried any partially-distant stations.
- If your answer is "No," compute your system's Base Rate Fee in block B. Leave part 9 blank.
- If your answer is "Yes" (that is, if you carried one or more partially-distant stations), you must complete part 9. Leave block B below blank.

What is a "partially-distant station?" A station is "partially-distant" if, at the time your system carried it, some of your subscribers were located within that station's local service area and others were located outside that area. A television station's "local service area" is the area within which it is "entitled to insist upon its signal being retransmitted by a cable system pursuant to rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976."

8

Computation
of
Base Rate Fee

BLOCK A: CARRIAGE OF PARTIALLY-DISTANT STATIONS

• Did your cable system retransmit the signals of any partially-distant television stations during the accounting period?

- ☐ Yes—Complete part 9 of this Schedule. ☒ No—Complete the following sections.

BLOCK B: NO PARTIALLY-DISTANT STATIONS—COMPUTATION OF BASE RATE FEE

Section 1 Enter the amount of "gross receipts from space K (page 7) \$ 710,577.79

Section 2 Enter the total number of permitted DSEs from block B, part 6 of this Schedule.
(If block A of part 6 was checked "yes," use the total number of DSEs from part 5.) 3.5

Section 3 If the figure in section 2 is 4,000 or less, compute your Base Rate Fee here and leave section 4 blank.

- A. Enter .00893 of "gross receipts" (the amount in section 1) \$ 6,345.46
- B. Enter .00563 of "gross receipts" (the amount in section 1) \$ 4,000.55
- C. Subtract 1,000 from total DSEs (the figure in section 2) and enter here 2.5
- D. Multiply line B by line C and enter here \$ 10,001.38
- E. Add lines A, and D. This is your Base Rate Fee. Enter here
and in block 3, space L (page 7)
Base Rate Fee \$ 16,346.84

Name

SAINT CROIX CABLE TV 003842

8

Computation
of
Base Rate Fee

Section
4

If the figure in section 2 is more than 4,000, compute your Base Rate Fee here and leave section 3 blank.

A. Enter .00893 of "gross receipts" (the amount in section 1).....

\$ _____

B. Enter .00563 of "gross receipts" (the amount in section 1).....

\$ _____

C. Multiply line B by 3.000 and enter here.....

\$ _____

D. Enter .00285 of "gross receipts" (the amount in section 1).....

\$ _____

E. Subtract 4,000 from total OSEs (the figure in section 2) and enter here.....

F. Multiply line D by line E and enter here.....

\$ _____

G. Add lines A, C, and F. This is your Base Rate Fee. Enter here and in block 3, space L (page 7)
Base Rate Fee.....

\$ _____

9

Computation
of
Base Rate Fee
and
Syndicated
Exclusivity
Surcharge
for
Partially-
Distant
Stations

In General: If any of the stations you carried was "partially-distant," the statute allows you, in computing your Base Rate Fee, to exclude receipts from subscribers located within the station's local service area from your system's total "gross receipts." To take advantage of this exclusion, you must

First: Divide all of your subscribers into "subscriber groups," each group consisting entirely of subscribers that are "distant" to the same station or the same group of stations.

Next: Treat each subscriber group as if it were a separate cable system. Determine the number of OSEs and the portion of your system's "gross receipts" attributable to that group, and calculate a separate Base Rate Fee for each group.

Finally: Add up the separate Base Rate Fees for each subscriber group. That total is the Base Rate Fee for your system.

Important: If any portion of your cable system is located within the top 100 television market and the station is not exempt, you must also compute a Syndicated Exclusivity Surcharge for each subscriber group. In this case, complete both block A and B below. However, if your cable system is wholly located outside all major television markets, complete block A only.

How to Identify a Subscriber Group

Step 1: Determine the local service area of each wholly-distant and each partially-distant station you carried.

Step 2: For each wholly-distant and each partially-distant station you carried, determine which of your subscribers were located outside the station's local service area. A subscriber located outside the local service area of a station is "distant" to that station (and, by the same token, the station is "distant" to the subscriber.)

Step 3: Divide your subscribers into subscriber groups according to the complement of stations to which they are "distant." Each subscriber group must consist entirely of subscribers who are "distant" to exactly the same complement of stations. Note that a cable system will have only one subscriber group when the distant stations it carried have local service areas that coincide.

Computing the Base Rate Fee for each subscriber group: Block A contains separate sections, one for each of your system's subscriber groups.

In each section:

- Identify the communities/areas represented by each subscriber group.
- Give the call sign for each of the stations in the subscriber group's complement—that is, each station that is "distant" to all of the subscribers in the group.
- If:
 - 1) your system is located wholly outside all major and smaller television markets, give each station's OSE as you gave it in parts 2, 3, and 4 of this Schedule; or,
 - 2) any portion of your system is located in a major or smaller television market, give each station's OSE as you gave it in block 8, part 6 of this Schedule.
- Add the OSEs for each station. This gives you the total OSEs for the particular subscriber group.
- Calculate "gross receipts" from the subscriber group. For further explanation of "gross receipts" see page (vi) of the General Instructions.
- Compute a Base Rate Fee for each subscriber group using the formula outline in block 8 of part 8 of this Schedule on the preceding page. In making this computation, use the OSE and "gross receipts" figure applicable to the particular subscriber group (that is, the total OSEs for that group's complement of stations and total "gross receipts" from the subscribers in that group). You do not need to show your actual calculations on the form. For each subscriber group with less than 1,000 OSE use the following formula to compute the Base Rate Fee: "Gross Receipts" x .00893 x Total OSEs for that Subscriber Group = Base Rate Fee.

LEGAL NAME OF OWNER OF CABLE SYSTEM:

SAINT CROIX CABLE TV 003842

Name

BLOCK A: COMPUTATION OF BASE RATE FEES FOR EACH SUBSCRIBER GROUP

FIRST SUBSCRIBER GROUP

SECOND SUBSCRIBER GROUP

COMMUNITY/ AREA

COMMUNITY/ AREA

CALL SIGN

DSE

CALL SIGN

DSE

CALL SIGN

DSE

CALL SIGN

DSE

9

Computation of
Base Rate Fee
and
Syndicated
Exclusivity
Surcharge
for
Partially-
Distant
Stations

"Total DSEs"

"Gross Receipts" First Group

\$

Base Rate Fee First Group

\$

"Total DSEs"

"Gross Receipts" Second Group

\$

Base Rate Fee Second Group

\$

THIRD SUBSCRIBER GROUP

FOURTH SUBSCRIBER GROUP

COMMUNITY/ AREA

COMMUNITY/ AREA

CALL SIGN

DSE

CALL SIGN

DSE

CALL SIGN

DSE

CALL SIGN

DSE

"Total DSEs"

"Gross Receipts" Third Group

\$

Base Rate Fee Third Group

\$

"Total DSEs"

"Gross Receipts" Fourth Group

\$

Base Rate Fee Fourth Group

\$

Base Rate Fee: Add the Base Rate Fees for each subscriber group as shown in the boxes above.
Enter here and in block 3, space L (page 7)

\$

LEGAL NAME OF OWNER OF CABLE ST

SAINT CROIX CABLE TV 003842

9

**Computation
of
Base Rate Fee
and
Syndicated
Exclusivity
Surcharge
for
Partially-
Distant
Stations**

BLOCK 8: COMPUTATION OF SYNDICATED EXCLUSIVITY SURCHARGE FOR EACH SUBSCRIBER GROUP

If your cable system is located within a top 100 television market and the station is not exempt, you must also compute a Syndicated Exclusivity Surcharge. Indicate which major television market any portion of your cable system is located in as defined by section 78.5 of FCC rules in effect on June 24, 1981:

☐ **First 50 major television markets**

☐ Second 50 major television markets

INSTRUCTIONS:

Step 1: In line 1, give the total OSEs by subscriber group for commercial VHF Grade B contour stations listed in block A, part 9 of this Schedule.

Step 2: In line 2 give the total number of DSEs by subscriber group for the VHF Grace B contour stations that were classified as "Exempt DSEs" in block C, part 7 of this Schedule. If none enter zero.

Step 3: In line 3 subtract line 2 from line 1. This is the total number of DSEs used to compute the surcharge.

Step 4: Compute the surcharge for each subscriber group using the formula outlined in block D, section 3 or 4 of part 7 of this Schedule. In making this computation use "Gross Receipts" figures applicable to the particular group. You do not need to show your actual calculations on this form.

NOTE: If a subscriber group has less than 1.00 DSE, use the following formula to compute the surcharge. Top 50 Television Market—"Gross Receipts" x .00550 x Surcharge DSEs for the Subscriber Group = Syndicated Exclusivity Surcharge. Second 50 Television Market—"Gross Receipts" x .003 x Surcharge DSEs for the Subscriber Group = Syndicated Exclusivity Surcharge.

FIRST SUBSCRIBER GROUP

Line 1: Enter the VHF DSEs

Line 2: Enter the "Example DSEs" _____

Line 3: Subtract line 2 from line 1 and enter here. This is the total number of DSEs for this subscriber group subject to the surcharge computation.

**SYNDICATED EXCLUSIVITY
SURCHARGE**

First Group S

SECOND SUBSCRIBER GROUP

Line 1: Enter the VMF DSEs

Line 2: Enter the "Exempt DSEs" _____

Line 3: Subtract line 2 from line 1, and enter here. This is the total number of DSEs for this subscriber group subject to the surcharge computation.....

**SYNDICATED EXCLUSIVITY
SURCHARGE**

Second Group S

THIRD SUBSCRIBER GROUP

Line 1: Enter the VHF DSEs:

Line 2: Enter the "Exempt DSE": _____

Line 3: Subtract line 2 from line 1 and enter here. This is the total number of DSEs for this subscriber group subject to the surcharge computation.

**SYNDICATED EXCLUSIVITY
SURCHARGE**

Third Group.....\$

FOURTH SUBSCRIBER GROUP

Line 1: Enter the VHF DSEs

Line 2: Enter the "Exempt DSEs"

Line 3: Subtract line 2 from line 1 and enter here. This is the total number of DSEs for this subscriber group subject to the surcharge computation.

***SYNDICATED EXCLUSIVITY
SURCHARGE**

Fourth Group \$

SYNDICATED EXCLUSIVITY SURCHARGE: Add the surcharge for each subscriber group as shown in the boxes above. Enter here and in block 4, line 3 of **schedule L** (page 7)

S _____

PRO FORMA SA3 ASSUMES ST. CROIX CABLE SERVES PUERTO RICO

STATEMENT OF ACCOUNT for Secondary Transmissions by Cable Systems (Long Form)

General Instructions are at the
end of this form (pages (i)-(vii)).

FOR COPYRIGHT OFFICE USE ONLY	
DATE RECEIVED	AMOUNT
	\$
	ALLOCATION NUMBER

SA3 *Ans'd*
Long Form
Return to:
LICENSING DIVISION
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
WASHINGTON, DC 20557
(202) 707-8150

A Accounting Period	ACCOUNTING PERIOD COVERED BY THIS STATEMENT: JULY 1 - DECEMBER 31, 1996																																														
B Owner	<p>INSTRUCTIONS: Your file has been established under the information given below. If there are any changes, draw a line through the incorrect information and print or type the correct information beside it. Give the full legal name of the owner of the cable system. If the owner is a subsidiary of another corporation, give the full corporate title of the subsidiary, not that of the parent corporation. List any other name or names under which the owner conducts the business of the cable system.</p> <p>LEGAL NAME OF OWNER/MAILING ADDRESS OF CABLE SYSTEM</p> <div style="display: flex; justify-content: space-between; align-items: center;"> <div style="text-align: right;">003842 96/2 SA 3</div> </div> <p>SAINT CROIX CABLE TV P.O. BOX 5968 SAINT CROIX, VI 00823-5968</p>																																														
C System	<p>INSTRUCTIONS: In line 1, give any business or trade names used to identify the business and operation of the system unless these names already appear in space B. In line 2, give the mailing address of the system, if different from the address given in space B.</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 5%; text-align: center;">1</td> <td colspan="3">IDENTIFICATION OF CABLE SYSTEM:</td> </tr> <tr> <td style="text-align: center;">2</td> <td colspan="3"> <p>MAILING ADDRESS OF CABLE SYSTEM:</p> <p>4501 Estate Diamond</p> <p>Christiansted, St. Croix, USVI 00820</p> <p style="font-size: small; text-align: center;">(City, Town, State, ZIP Code)</p> </td> </tr> </table>			1	IDENTIFICATION OF CABLE SYSTEM:			2	<p>MAILING ADDRESS OF CABLE SYSTEM:</p> <p>4501 Estate Diamond</p> <p>Christiansted, St. Croix, USVI 00820</p> <p style="font-size: small; text-align: center;">(City, Town, State, ZIP Code)</p>																																						
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D Area Served	<p>INSTRUCTIONS: List each separate community served by the cable system. A "community" is the same as a "community unit" as defined in FCC rules: "... a separate and distinct community or municipal entity (including unincorporated communities within unincorporated areas and including single, discrete unincorporated areas.) 47 C.F.R. §78.5(mm). The first community that you list will serve as a form of system identification hereafter known as the "First Community." Please use it as the First Community on all future filings. Note: Entities and properties such as hotels, apartments, condominiums or mobile home parks should be reported in parentheses below the identified city.</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 30%;">CITY OR TOWN</th> <th style="width: 10%;">STATE</th> <th style="width: 30%;">CITY OR TOWN</th> <th style="width: 10%;">STATE</th> </tr> </thead> <tbody> <tr> <td>San Juan</td> <td>PR</td> <td></td> <td></td> </tr> <tr><td> </td><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td><td> </td></tr> <tr><td> </td><td> </td><td> </td><td> </td></tr> </tbody> </table>			CITY OR TOWN	STATE	CITY OR TOWN	STATE	San Juan	PR																																						
CITY OR TOWN	STATE	CITY OR TOWN	STATE																																												
San Juan	PR																																														
First Community																																															

LEGAL NAME OF OWNER OF CABLE SYSTEM SAINT CROIX CABLE TV 003842	Name
---------------------------------------------------------------------------	------

SECONDARY TRANSMISSION SERVICE: SUBSCRIBERS AND RATES

In General: The information in space E should cover all categories of "secondary transmission service" of the cable system, that is, the retransmission of television and radio broadcasts by your system to subscribers. Give information about other services (including pay cable) in space F, not here. All the facts you state must be those existing on the last day of the accounting period (June 30 or December 31, as the case may be).

Number of Subscribers: Both blocks in space E call for the number of subscribers to the cable system, broken down by categories of secondary transmission service. In general, you can compute the number of "subscribers" in each category by counting the number of billings in that category (the number of persons or organizations charged separately for the particular service at the rate indicated—not the number of sets receiving service).

Rate: Give the standard rate charged for each category of service. Include both the amount of the charge and the unit in which it is generally billed. (Example: "\$8/mth"). Summarize any standard rate variations within a particular rate category, but do not include discounts allowed for advance payment.

Block 1: In the left-hand block in space E, the form lists the categories of secondary transmission service that cable systems most commonly provide to their subscribers. Give the number of subscribers and rate for each listed category that applies to your system. Note: Where an individual or organization is receiving service that falls under different categories, that person or entity should be counted as a "subscriber" in each applicable category. Example: a residential subscriber who pays extra for cable service to additional sets would be included in the count under "Service to the First Set," and would be counted once again under "Service to Additional Set(s)."

Block 2: If your cable system has rate categories for secondary transmission service that are different from those printed in block 1, (for example, tiers of services which include one or more secondary transmissions), list them, together with the number of subscribers and rates, in the right-hand block. A two or three word description of the service is sufficient.

E

Secondary
Transmission
Service:
Subscribers
and Rates

BLOCK 1			BLOCK 2		
CATEGORY OF SERVICE	NO. OF SUBSCRIBERS	RATE	CATEGORY OF SERVICE	NO. OF SUBSCRIBERS	RATE
Residential:					
• Service to First Set	12,716	9.90			
• Service to Additional Set(s)		-0-			
• FM Radio (if separate rate)		-0-			
Motel, Hotel					
Commercial					
• Inverter					
• Residential					
• Non-Residential					

SERVICES OTHER THAN SECONDARY TRANSMISSIONS: RATES

In General: Space F calls for rate (not subscriber) information with respect to all your cable system's services that were not covered in space E. That is, those services that are not offered in combination with any secondary transmission service for a single fee. There are two exceptions: you do not need to give rate information concerning: (1) services furnished at cost; and (2) services or facilities furnished to nonsubscribers. Rate information should include both the amount of the charge and the unit in which it is usually billed. If any rates are charged on a variable per-program basis, enter only the letters "PP" in the rate column.

Block 1: Give the standard rate charged by the cable system for each of the applicable services listed.

Block 2: List any services that your cable system furnished or offered during the accounting period that were not listed in block 1 and for which a separate charge was made or established. List these other services in the form of a brief (two or three word) description, and include the rate for each.

F

Services
Other Than
Secondary
Transmissions:
Rates

BLOCK 1		BLOCK 2	
CATEGORY OF SERVICE	RATE	CATEGORY OF SERVICE	RATE
Continuing Services:		Installation: Non-Residential	
• Pay Cable	10/9	• Motel, Hotel	13.50
• Pay Cable—Add'l Channel	1.00	• Commercial	4.95
• Fire Protection	-0-	• Pay Cable	
• Burglar Protection	-0-	• Pay Cable—Add'l Channel	
Installation: Residential		• Fire Protection	
• First Set	33.06	• Burglar Protection	
• Additional Set(s)	9.84	Other Services:	
• FM Radio (if separate rate)	-0-	• Reconnect	
• Converter		• Disconnect	
		• Outlet Relocation	
		• Move to New Address	

LOCAL NAME OF OWNER OF CABLE SYSTEM:

SAINT CROIX CABLE TV 003842

Notes

PRIMARY TRANSMITTERS: RADIO

In General: List every radio station carried on a separate and discrete basis and list those FM stations carried on an I-band basis whose signals were "generally receivable" by your cable system during the accounting period.

Special Instructions Concerning All-Band FM Carriage: Under Copyright Office Regulations, an FM Signal is "generally receivable" if: (1) "It is carried by the system whenever it is received at the system's headend"; and (2) it can be expected, on the basis of monitoring, to be received at the headend, with the system's FM antenna, during certain stated intervals. For detailed information about the the Copyright Office Regulations on this point, see page (v) of the General Instructions.

Column 1: Identify the call sign of each station carried.

Column 2: State whether the station is AM or FM.

Column 3: If the radio station's signal was electronically processed by the cable system as a separate and discrete signal, indicate this by placing a check mark in the "S/D" column.

Column 4: Give the station's location (the community to which the station is licensed by the FCC or, in the case of Mexican or Canadian stations, if any, the community with which the station is identified).

H

Primary Transmitters: Radio

[illegible]

SAINT CROIX CABL TV 003842

**Substitute
Carriage:
Special
Statement and
Program Log**

In space 1, identify every nonnetwork television program, broadcast by a distant station, that your cable system carried on a substitute basis during the accounting period, under specific present and former FCC rules, regulations, or authorizations. For a further explanation of the programming that must be included in this log, see page (v) of the General Instructions.

• During the accounting period, did your cable system carry, on a substitute basis, any nonnetwork television program broadcast by a distant station? ☐ Yes ☐ No

Note: If your answer is "No", leave the rest of this page blank. If your answer is "Yes", you must complete the program log in block 2.

In General: List each substitute program on a separate line. Use abbreviations wherever possible, if their meaning is clear. If you need more space, please attach additional pages.

Column 1: Give the title of every nonnetwork television program ("substitute program") that, during the accounting period, was broadcast by a distant station and that your cable system substituted for the programming of another station under certain FCC rules, regulations, or authorizations. See page (v) of the General Instructions for further information. Do not use general categories like "movies" or "basketball." List specific program titles, for example, "I Love Lucy" or "NBA Basketball: 76ers vs. Bulls."

Column 2: If the program was broadcast live, enter "Yes". Otherwise enter "No".

Column 3: Give the call sign of the station broadcasting the substitute program.

Column 4: Give the broadcast station's location (the community to which the station is licensed by the FCC or, in the case of Mexican or Canadian stations, if any, the community with which the station is identified).

Column 8: Give the month and day when your system carried the substitute program. Use numerals, with the month first. Example: for May 7 give "5/7".

Column 6: State the times when the substitute program was carried by your cable system. List the times accurately, to the nearest five minutes. Example: a program carried by a system from 8:01:15 p.m. to 8:28:30 p.m. should be stated as "8:00-8:30 p.m."

Column 7: Enter the letter "R" if the listed program was substituted for programming that your system was required to delete under FCC rules and regulations in effect during the accounting period; or enter the letter "P" if the listed program was substituted for programming that your system was permitted to delete under FCC rules and regulations in effect on October 19, 1978.

[illegible]

LEGAL NAME OF OWNER OF CABLE SYSTEM:

SAINT CROIX CABLE TV 003842

Methods

PART-TIME CARRIAGE LOG

In General: This space ties in with column 5 of space G. If you listed a station's basis of carriage as "LAC" for part-time carriage due to lack of activated channel capacity, you are required to complete this log giving the total dates and hours your system carried that station. If you need more space, please attach additional pages.

Column 1 (Call Sign): Give the call sign of every distant station whose basis of carriage you identified by "LAC" in column 8 of space G.

Column 2 (Dates and hours of Carriage): For each station, list the dates and hours when part-time carriage occurred during the accounting period.

- Give the month and day when the carriage occurred. Use numerals, with the month first. Example: for April 10 give "4/10."
- State the starting and ending times of carriage to the nearest quarter hour. In any case where carriage ran to the end of the television station's broadcast day, you may give an approximate ending hour, followed by the abbreviation "app". Example: "12:30 a.m.—3:15 a.m. app."
- You may group together any dates when the hours of carriage were the same. Example: "5/10-5/14, 8:00 p.m.-12:00 p.m."

J

Part-Time Carriage Loan

DATES AND HOURS OF PART-TIME CARRIAGE

[illegible]

Name

LEGAL NAME OF OWNER OF CABLE SYSTEM (Give the name exactly as it appears in space B, line 1, page 1)

SAINT CROIX CABLE TV 003842

K**GROSS RECEIPTS**

Gross Receipts

Instructions: The figure you give in this space determines the form you file and the amount you pay. Enter the total of all amounts ("gross receipts") paid to your cable system by subscribers for the system's "secondary transmission service" (as identified in space E) during the accounting period. For a further explanation of how to compute this amount, see page (vi) of the General Instructions.

Gross receipts from subscribers for secondary transmission service(s) during the accounting period.

\$ 710,577.79

(Amount of "gross receipts")

IMPORTANT: You must complete a statement in space P concerning gross receipts.**L**

Copyright Royalty Fee

INSTRUCTIONS FOR COMPUTING THE COPYRIGHT ROYALTY FEE

Use the blocks in this space L to determine the royalty fee you owe:

- Complete block 1, showing your Minimum Fee.
 - Complete block 2, showing whether your system carried any distant television stations.
 - If your system did not carry any distant television stations, leave block 3 blank. Enter the amount of the Minimum Fee from block 1 in the box in block 4, and pay that amount with your Statement of Account.
 - If your system did carry any distant television stations you must complete the applicable parts of the DSE Schedule accompanying this form and attach the Schedule to your Statement of Account.
- If the number of permitted DSEs calculated in part 6, block B or part 5 of this Schedule is 1.0 or less, leave block 3 blank, and enter the amount of the Minimum Fee, from block 1 of this space, on line 1 in block 4. If the number of DSEs is greater than 1.0, enter in block 3 the amount of the Base Rate Fee from part 8 or part 9, block A of the Schedule. On line 1 in block 4, enter whichever amount is larger: the Minimum Fee from block 1 or the Base Rate Fee from block 3.
- If part 6 of the DSE Schedule was completed, enter on line 2 in block 4 below the amount from line 7 of block C.
- If part 7 or part 9, block B, of the DSE Schedule was completed, enter on line 3 in block 4 below the surcharge amount.

Block 1 MINIMUM FEE: All cable systems with semiannual "gross receipts" of \$292,000 or more are required to pay at least the Minimum Fee, regardless of whether they carried any distant stations. This fee is .893 of one percent of the system's "gross receipts" for the accounting period.

Line 1. Enter the amount of "gross receipts" from space K. 710,577.79

Line 2. Multiply the amount in line 1 by .00893

Enter the result here.

This is your Minimum Fee. \$ 6,345.46

Block 2 DISTANT TELEVISION STATIONS CARRIED: Your answer here must agree with the information you gave in space G. If, in space G, you identified any stations as "distant" by stating "Yes" in column 4, you must check "Yes" in this block.

• Did your cable system carry any distant television stations during the accounting period?

☐ Yes—Complete the DSE Schedule. ☐ No—Leave block 3 below blank and complete line 1, block 4.

Block 3 BASE RATE FEE: Enter the Base Rate Fee from either part 8, section 3 or 4, or Part 9, block A of the DSE Schedule. \$ 16,346.84

Block 4 Line 1. BASE RATE or MINIMUM FEE: If you did not complete block 3, enter the minimum fee from block 1. If you completed block 3, enter either the minimum fee from block 1 or the Base Rate Fee from block 3, whichever is larger. \$ 16,346.84

Line 2. **3.75 Fee:** Enter the total fee from line 7, block C, part 6 of the DSE Schedule. If none, enter zero. \$ 0

Line 3. **SYNDICATED EXCLUSIVITY SURCHARGE:** Enter the fee from either part 7 (block D, section 3 or 4) or part 9 (block B) of the DSE Schedule. If none, enter zero. \$ 0

Line 4. **INTEREST CHARGE:** Enter the amount from line 4, space Q, page 9 (Interest Worksheet) \$ 0

TOTAL ROYALTY FEE. Add Lines 1, 2, 3, and 4 and enter total here. \$ 16,346.84

Remit this amount in the form of a certified check, cashier's check, or money order, payable to Register of Copyrights, or electronic payment. Do not send cash.

EXCEPTION: If you listed the **MINIMUM FEE** in line 1 do not add this figure to the Total Royalty Fee if the 3.75 fee in line 2 exceeds the **MINIMUM FEE**. Instead, draw a line through the **MINIMUM FEE** and enter the sum from the following formula: gross receipts x .00893 x total "permitted" DSEs (from part 6, block B) = Fee for line 1. However, if the total "permitted" DSEs is zero then enter .000 on line 1.

LEGAL NAME OF OWNER OF CABLE SYSTEM SAINT CROIX CABLE TV 003842		M Channels
CHANNELS INSTRUCTIONS: You must give: (1) the number of channels on which the cable system carried television broadcast stations to its subscribers; and, (2) the cable system's total number of activated channels, during the accounting period.		M Channels
1. Enter the total number of channels on which the cable system carried television broadcast stations. <div style="float: right; border: 1px solid black; width: 100px; text-align: center; padding: 2px;">9</div>		
2. Enter the total number of activated channels on which the cable system carried television broadcast stations and nonbroadcast services. <div style="float: right; border: 1px solid black; width: 100px; text-align: center; padding: 2px;">61</div>		
INDIVIDUAL TO BE CONTACTED IF FURTHER INFORMATION IS NEEDED: (Identify an individual to whom we can write or call about this Statement of Account.)		N Contact
Name Keith A. Kirkman Telephone (809) 778-6701 <small>(Area Code)</small>		N Contact
Address 4501 Estate Diamond <small>(Residence, Street, Rural Route, Apartment or Suite Number)</small>		
Christiansted, St. Croix USVI 00820 <small>(City, Town, State, ZIP Code)</small>		
CERTIFICATION: (This Statement of Account must be certified and signed in accordance with Copyright Office Regulations, as explained in the General Instructions.)		O Certification
• I, the undersigned, hereby certify that: (Check one, but only one, of the boxes.) <input type="checkbox"/> Owner other than corporation or partnership) I am the owner of the cable system as identified in line 1 of space B; or <input type="checkbox"/> Agent of owner other than corporation or partnership) I am the duly authorized agent of the owner of the cable system as identified in line 1 of space B, and that the owner is not a corporation or partnership; or <input checked="" type="checkbox"/> (Officer or partner) I am an officer (if a corporation) or a partner (if a partnership) of the legal entity identified as owner of the cable system in line 1 of space B.		O Certification
I have examined the Statement of Account and hereby declare under penalty of law that all statements of fact contained herein are true, complete, and correct to the best of my knowledge, information, and belief, and are made in good faith. (18 U.S.C., Section 1001(1988))		
Handwritten signature: (X)		
Typed or printed name: Keith A. Kirkman		
Title: Vice President/Chief Operating Officer <small>(Title or official position held by individual or partnership)</small>		
Date: February 26, 1997		

Name	LEGAL NAME OF OWNER OF CABLE TV SAINT CROIX CABLE TV 003842												
<p>P</p> <p>Statement of Gross Receipts</p>	<p>SPECIAL STATEMENT CONCERNING GROSS RECEIPTS EXCLUSION</p> <p>The Satellite Home Viewer Act of 1988 amended Title 17, section 111(d)(1)(A), of the Copyright Act by adding the following sentence:</p> <p>"In determining the total number of subscribers and the gross amounts paid to the cable system for the basic service of providing secondary transmissions of primary broadcast transmitters, the system shall not include subscribers and amounts collected from subscribers receiving secondary transmissions for private home viewing pursuant to section 119."</p> <p>For more information on when to exclude these amounts, see the note on page(vi) of the General Instructions.</p> <p>During the accounting period did the cable system exclude any amounts of gross receipts for secondary transmissions made by satellite carriers to satellite home "dish" owners?</p> <p><input type="checkbox"/> NO</p> <p><input type="checkbox"/> YES. Enter the total here \$ _____</p> <p>-and list the satellite carrier(s) below.</p> <table border="1"> <tr> <td data-bbox="231 646 829 786">Name</td> <td data-bbox="829 646 1402 786">Name</td> </tr> <tr> <td data-bbox="231 786 829 940">Mailing Address</td> <td data-bbox="829 786 1402 940">Mailing Address</td> </tr> <tr> <td data-bbox="231 786 829 940">.....</td> <td data-bbox="829 786 1402 940">.....</td> </tr> <tr> <td data-bbox="231 786 829 940">.....</td> <td data-bbox="829 786 1402 940">.....</td> </tr> <tr> <td data-bbox="231 786 829 940">.....</td> <td data-bbox="829 786 1402 940">.....</td> </tr> <tr> <td data-bbox="231 786 829 940">.....</td> <td data-bbox="829 786 1402 940">.....</td> </tr> </table>	Name	Name	Mailing Address	Mailing Address
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<p>Q</p> <p>Interest Worksheet</p>	<p>WORKSHEET FOR COMPUTING INTEREST</p> <p>You must complete this worksheet for those royalty payments submitted as a result of a late payment or underpayment. For an explanation of interest assessment, see page (vi) General Instructions.</p> <p>Line 1. Enter the amount of late payment or underpayment \$ _____</p> <p>..... x _____ %</p> <p>Line 2. Multiply line 1 by the interest rate* and enter the sum here x _____ days</p> <p>Line 3. Multiply line 2 by the number of days late x .00274</p> <p>Line 4. Multiply line 3 by .00274** enter here and on line 4, Block 4, space L (page 7) \$ _____ (Interest charge)</p> <p>*Contact the Licensing Division at 202-707-8150 for the interest rate for the accounting period in which the late payment or underpayment occurred.</p> <p>**This is the decimal equivalent of 1/365, which is the interest assessment for one day late.</p> <p>NOTE: If you are filing this worksheet covering a Statement of Account already submitted to the Copyright Office, please list below the Owner, Address, First Community Served, and Accounting Period as given in the original filing.</p> <p>Owner</p> <p>Address</p> <p>.....</p> <p>First Community Served</p> <p>Accounting Period</p>
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INSTRUCTIONS FOR DSE SCHEDULE

WHAT IS A "DSE"?

The term "distant signal equivalent" ("DSE") refers to the numerical value given by the Copyright Act to each distant television station carried by a cable system during an accounting period. Your system's total number of DSEs determines the royalty you owe.

FORMULAS FOR COMPUTING A STATION'S DSE

There are two different formulas for computing DSEs: (1) a basic formula for all distant stations listed in space G (page 3); and (2) a special formula for those stations carried on a substitute basis and listed in space I (page 5). (Note that, if a particular station is listed in both space G and space I, a DSE must be computed twice for that station: once under the basic formula and again under the special formula. However, a station's total DSE is not to exceed its full type-value. If this happens, contact the Licensing Director.)

BASIC FORMULA: FOR ALL DISTANT STATIONS LISTED IN SPACE G OF SA3 (LONG FORM)

Step 1: Determine the station's TYPE-VALUE. For purposes of computing DSEs, the Copyright Act gives different values to distant stations depending upon their type. If, as shown in space G of your Statement of Account (page 3), a distant station is:

- **INDEPENDENT:** its type-value is ▶ 1.00
- **NETWORK:** its type value is ▶ 25
- **NONCOMMERCIAL EDUCATIONAL:** its type-value is ▶ 25

Note that local stations are not counted at all in computing DSEs.

Step 2: Calculate the station's BASIS OF CARRIAGE VALUE: The DSE of a station also depends on its basis of carriage. If, as shown in space G of your Form SA3, the station was carried part-time because of lack of activated channel capacity its basis of carriage value is determined by (1) calculating the number of hours the cable system carried the station during the accounting period; and (2) dividing that number by the total number of hours the station broadcast over the air during the accounting period. The basis of carriage value for all other stations listed in space G is 1.0.

Step 3: Multiply the result of step 1 by the result of step 2. This gives you the particular station's DSE for the accounting period. (Note that, for stations other than those carried on a part-time basis due to lack of activated channel capacity, actual multiplication is not necessary since the DSE will always be the same as the type value.)

SPECIAL FORMULA: FOR STATIONS LISTED IN SPACE I OF SA3 (LONG FORM)

Step 1: For each station, calculate the number of programs that, during the accounting period, were broadcast live by the station, and were substituted for programs delayed at the option of the cable system. (These are programs for which you have entered "Yes" in column 2 and "P" in column 7 of space I.)

Step 2: Divide the result of step 1 by the total number of days in the calendar year (365—or 366 in a leap year). This gives you the particular station's DSE for the accounting period.

TOTAL OF DSEs

In part 5 of this Schedule you are asked to add up the DSEs for all of the distant television stations your cable system carried during the accounting period. This is the total sum of all DSEs computed by the basic formula and by the special formula.

• If the total is 1.0 or less, complete parts 6 and 7 of the DSE Schedule, as applicable, and leave parts 8 and 9 blank.

• If the total is more than 1.0, complete parts 6 and 7 of the DSE Schedule, as applicable, and complete part 8 or part 9.

THE ROYALTY FEE

The total royalty fee is determined by calculating the Minimum Fee and, if the DSEs are more than 1.0, the Base Rate Fee. In addition, cable systems located within certain television markets areas may be required to calculate the 3.75 Fee and/or the Syndicated Exclusivity Charge.

The 3.75 Fee, if a cable system located in whole or in part within a television market added stations after June 24, 1981, that would not have been "permitted" under FCC rules, regulations and authorizations (hereafter referred to as "the former FCC rules") in effect on June 24, 1981, the system must compute the 3.75 fee using a formula based on the number of DSEs added. These DSEs used in computing the 3.75 Fee will not be used in computing the Base Rate Fee and Syndicated Exclusivity Surcharge.

The Syndicated Exclusivity Surcharge. Cable systems located in whole or in part within a major television market, as defined by FCC rules and regulations, must calculate a Syndicated Exclusivity Surcharge for the carriage of any commercial VHF station that places a Grade B contour, in whole or in part, over the cable system which would have been subject to the FCC's syndicated exclusivity rules in effect on June 24, 1981.

The Minimum Fee/The Base Rate Fee. All cable systems filing SA3 (Long Form) must pay at least the Minimum Fee which is .0375% of "gross receipts." Cable systems with a total of more than 1.0 DSE must compute the Base Rate Fee using a statutory formula based on the number of DSEs. The cable system pays either the "Minimum Fee," or the "Base Rate Fee," whichever is larger, in addition to a "3.75 Fee" and a "Syndicated Exclusivity Surcharge," as applicable.

What is a "Permitted" Station? A "permitted" station refers to a distant station whose carriage is not subject to the 3.75% Rate, but is subject to the Base Rate and, where applicable, the Syndicated Exclusivity Surcharge. A "permitted" station would include the following:

- 1) A station actually carried within any portion of a cable system prior to June 25, 1981, pursuant to the former FCC rules.
- 2) A station first carried after June 24, 1981, which could have been carried under FCC rules in effect on June 24, 1981, if such carriage would not have exceeded the market quota imposed for the importation of distant stations under these rules.
- 3) A station of the same type substituted for a carried network, noncommercial educational, or regular independent station for which a quota was or would have been imposed under FCC rules (47 CFR 78.69 (b),(c), 78.61 (b),(c),(d), and 78.63 (a) [referring to 78.61 (b),(d)] in effect on June 24, 1981.
- 4) A station carried pursuant to an individual waiver granted between April 15, 1976, and June 25, 1981 under the FCC rules and regulations in effect on April 15, 1976.
- 5) In the case of a station carried prior to June 25, 1981, on a part-time and/or substitute basis only, that fraction of the current DSE represented by prior carriage.

NOTE: If your cable system carried a station which you believe qualifies as a "permitted" station but does not fall into one of the above categories, please attach written documentation to the Statement of Account detailing the basis for its classification.

Substitution of Grandfathered Stations. Under section 78.65 of the former FCC rules, a cable system was not required to delete any station that it was authorized to carry or was lawfully carrying prior to March 31, 1972, even if the total number of distant stations carried exceeded the market quota imposed for the importation of distant stations. Carriage of these "grandfathered" stations is not subject to the 3.75% Rate, but is subject to the Base Rate, and where applicable, the Syndicated Exclusivity Surcharge. The Copyright Royalty Tribunal has stated its view that, since section 78.65 of the former FCC rules would not have permitted substitution of a grandfathered station, the 3.75% Rate applies to a station substituted for a grandfathered station if carriage of the station exceeds the market quota imposed for the importation of distant stations.

COMPUTING THE 3.75% RATE—PART 6 OF THE DSE SCHEDULE

• Determine which distant stations were carried by the system pursuant to former FCC rules in effect on June 24, 1981.

• Identify any station carried prior to June 25, 1981, on a substitute and/or part-time basis only and complete the log to determine the portion of the DSE exempt from the 3.75% Rate.

• Subtract the number of DSEs resulting from this carriage from the number of DSEs reported in part 5 of the DSE Schedule. This is the total number of DSEs subject to the 3.75% Rate. Multiply these DSEs x gross receipts x .0375. This is the 3.75 Fee.

COMPUTING THE SYNDICATED EXCLUSIVITY SURCHARGE—PART 7 OF THE DSE SCHEDULE

• Determine if any portion of the cable system is located within a top 100 major television market as defined by the FCC rules and regulation in effect on June 24, 1981. If no portion of the cable system is located in a major television market, part 7 does not have to be completed.

• Determine which station(s) reported in block 8, part 6 is a commercial VHF station and places a Grade B contour in whole, or in part, over the cable system. If none of these stations are carried part 7 does not have to be completed.

• Determine which of those stations reported in block 8, part 7 of the DSE Schedule were carried before March 31, 1972. These stations are exempt from the FCC's syndicated exclusivity rules in effect on June 24, 1981, if you qualify to calculate the royalty fee based upon the carriage of partially-distant stations, and you elect to do so, you must compute the surcharge in part 9 of this Schedule.

• Subtract the exempt DSEs from the number of DSEs determined in block 8 of part 7. This is the total number of DSEs subject to the Syndicated Exclusivity Surcharge.

• Compute the Syndicated Exclusivity Surcharge based upon these DSEs and the appropriate formula for the system's market position. Note: The formula for computing the Syndicated Exclusivity Surcharge is structured to apply to a DSE of greater than 1.0. If the DSE is less than 1.0, multiply the "gross receipts" x .003 or .00599 (as applicable) x the DSE.

COMPUTATION OF COPYRIGHT ROYALTY FEE—PART 8 OF DSE SCHEDULE

Determine whether any of the stations you carried were "partially-distant"—that is, whether you retransmitted the signal of one or more stations to subscribers located within the station's local service area and, at the same time, to other subscribers located outside that area.

If none of the stations were "partially-distant," calculate your Base Rate Fee according to the following rates—for the system's permitted DSEs as reported in block B, part 6 or from part 5, whichever is applicable.

First DSE .893% of "gross receipts"
Each of the second, third, and fourth DSEs .563% of "gross receipts"
The fifth and each additional DSE .285% of "gross receipts"

PARTIALLY-DISTANT STATIONS—PART 9 OF THE DSE SCHEDULE

If any of the stations were "partially-distant":

1. Divide all of your subscribers into "subscriber groups" depending on their location. A particular "subscriber group" consists of all subscribers who are "distant" with respect to exactly the same complement of stations.

2. Identify the communities/areas represented by each subscriber group.

3. For each "subscriber group," calculate the total number of DSEs of that group's complement of stations.

If your system is located wholly outside all major and smaller television markets, give each station's DSEs as you gave them in parts 2, 3, and 4 of the Schedule; or

If any portion of your system is located in a major or smaller television market, give each station's DSE as you gave it in block B, part 6 of this Schedule.

4. Determine the portion of the total "gross receipts" you reported in

space K (page 7) that is attributable to each "subscriber group."

5. Calculate a separate Base Rate Fee for each "subscriber group," using (1) the rates given above; (2) the total number of DSEs for that group's complement of stations; and (3) the amount of "gross receipts" attributable to that group.

6. Add together the Base Rate Fees for each "subscriber group" to determine the system's total Base Rate Fee.

7. If any portion of the cable system is located in whole or in part within a major television market, you may also need to complete part 9, block B of the Schedule to determine the Syndicated Exclusivity Surcharge.

What To Do If You Need More Space on the DSE Schedule. There are no printed continuation sheets for the Schedule. In most cases the blanks provided should be large enough for the necessary information. If you need more space in a particular part, make a photocopy of the page in question (identifying it as a "Continuation Sheet"), enter the additional information on that copy, and attach it to the DSE Schedule.

Rounding Off DSEs. In computing DSEs on the DSE Schedule, you may round off to no less than the third decimal point. If you round off a DSE in any case, you must round off DSEs throughout the Schedule as follows:

• When the fourth decimal point is 1, 2, 3, or 4 the third decimal remains unchanged—(example: .34647 is rounded to .346)

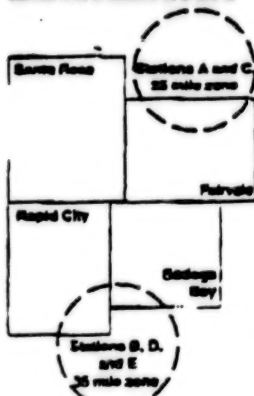
• When the fourth decimal point is 5, 6, 7, 8 or 9 the third decimal is rounded up—(example: .34651 is rounded to .347)

The example below is intended to supplement the instructions for calculating only the Base Rate Fee for "partially-distant" stations. The cable system would also be subject to the Syndicated Exclusivity Surcharge for "partially-distant" stations, if any portion is located within a major television market.

EXAMPLE:

COMPUTATION OF COPYRIGHT ROYALTY FEE FOR CABLE SYSTEM CARRYING "PARTIALLY-DISTANT" STATIONS

In most cases under current FCC rules all of Fairvale would be within the local service area of each station A and C and all of Rapid City and Bodega Bay would be within the local service area of stations B, D and E.



Distant Stations Carried	DSE	Identification of Subscriber Groups	"GROSS RECEIPTS" FROM SUBSCRIBERS
STATION		CITY	
A (Independent)	1.0	OUTSIDE LOCAL SERVICE AREA OF	
B (Independent)	1.0	Stations A, B, C, D, E	\$110,000.00
C (part-time)	.083	Stations A and C	80,000.00
D (part-time)	.139	Stations A and C	40,000.00
E (network)	.25	Stations B, D, and E	70,000.00
TOTAL DSEs	2.472	TOTAL "GROSS RECEIPTS"	\$300,000.00

Minimum Fee Total "Gross Receipts" \$300,000.00
x .00893 =
\$ 2,679.00

First Subscriber Group (Santa Rosa)	Second Subscriber Group (Rapid City and Bodega Bay)	Third Subscriber Group (Fairvale)
"Gross Receipts" \$110,000.00	"Gross Receipts" \$120,000.00	"Gross Receipts" \$70,000.00
DSEs 2.472	DSEs 1.083	DSEs 1.389
Base Rate Fee \$1,893.91	Base Rate Fee \$1,127.67	Base Rate Fee \$778.40
\$110,000 x .00893 x 1.0 = 982.30	\$120,000 x .00893 x 1.0 = 1,071.60	\$70,000 x .00893 x 1.0 = 625.10
\$110,000 x .00563 x 1.472 = 911.61	\$120,000 x .00563 x .083 = 56.07	\$70,000 x .00563 x .389 = 153.30
Base Rate Fee \$1,893.91	Base Rate Fee \$1,127.67	Base Rate Fee \$778.40

Total Base Rate Fee: \$1,893.91 + \$1,127.67 + \$778.40 = \$3,799.98

In this example the cable system would pay the Base Rate Fee because it is larger than the Minimum Fee, and would enter \$3,799.98 in space L, block 4, line 1, (page 7) to be added with the 3.75 fee and surcharge, if applicable, to determine its total Copyright Royalty Fee.

1
OWNER

LEGAL NAME OF OWNER OF CABLE SYSTEM:

SAINT CROIX CABLE TV 003842

ACCOUNTING PERIOD 96/2

2

Computation of DSEs for Category "O" Stations

INSTRUCTIONS:

In the column headed "Call Sign": list the call signs of all distant stations identified by the letter "O" in column 5 of space G (page 3).

In the column headed "DSE": for each independent station, give the DSE as "1.0"; for each network or noncommercial educational station, give the DSE as ".25."

CATEGORY "O" STATIONS: DSEs

CALL SIGN	DSE	CALL SIGN	DSE	CALL SIGN	DSE
WTBS	1.0	WRAL	.25		
WGN	1.0	WNBC	.25		
WOR	1.0				

SUM OF DSEs OF CATEGORY "O" STATIONS:

• Add the DSEs of each station.

Enter the sum here and in line 1 of part 5 of this Schedule.

3.50

LEGAL NAME OF OWNER OF CABLE SYSTEM:

SAINT CROIX CABLE TV 003842

Name _____

INSTRUCTIONS FOR COMPUTATION OF USEs FOR STATIONS CARRIED PART-TIME DUE TO LACK OF ACTIVATED CHANNEL CAPACITY

Column 1: List the call sign of all distant stations identified by "LAC" in column 5 of space G (page 3).

Column 2: For each station, give the number of hours your cable system carried the station during the accounting period. This figure should correspond with the information given in space J. Calculate only one DSE for each station.

Column 3: For each station, give the total number of hours that the station broadcast over the air during the accounting period.

Column 4: Divide the figure in column 2 by the figure in column 3, and give the result in decimals in column 4. This figure must be carried out at least to the third decimal point. This is the "base of carnage value" for the station.

Column 5: For each independent station give the "type-value" as "1.0." For each network or noncommercial educational station, give the "type-value" as ".25."

Column 6: Multiply the figure in column 4 by the figure in column 5, and give the result in column 6. Round to no less than the third decimal point. This is the station's "OSE." (For more information on rounding, see page (vii) of the General Instructions.)

CATEGORY "LAC" STATIONS: COMPUTATION OF DSEs

[illegible]

SUM OF DSEs OF CATEGORY "LAC" STATIONS:

Add the DSEs of each station.

Enter the sum here and in line 2 of part 5 of this Schedule.

-0-

INSTRUCTIONS FOR COMPUTATION OF DSE: FOR SUBSTITUTE-BASIS STATIONS:

Column 1: Give the call sign of each station listed in space 1 (page 5, the Log of Substitute Programs) if that station:

- * Carried by your system in substitution for a program that your system was permitted to delete under FCC rules and regulations in effect on October 19, 1976 (as shown by the letter "P" in column 7 of space 1); and

Column 2: For each station give the number of live, nonnetwork programs carried in substitution for programs that were deleted at your option. This figure should correspond with the information in space 1.

Column 3: Enter the number of days in the calendar year: 365, except in a leap year.

Column 4: Divide the figure in column 2 by the figure in column 3, and give the result in column 4. Round to no less than the third decimal point. This is the station's "OSE" (For more information on rounding, see page (vi) of the General Instructions.)

SUBSTITUTE-BASIS STATIONS: COMPUTATION OF PSEs

[illegible]

SUM OF DSEs OF SUBSTITUTE-BASIS STATIONS:

Add the DSEs of each station.

Enter the sum here and in line 3 of part 5 of this Schedule.

-0-

TOTAL NUMBER OF DSEs: Give the amounts from the boxes in parts 2, 3, and 4 of this Schedule, and add them to provide the total number of DSEs applicable to your system.

1. Number of DSEs from part 2

2. Number of DSEs from part 3

3. Number of DSEs from part 4

3.50

-0-

-0-

TOTAL NUMBER OF DSEs

3.50

5

Total Number
of DSEs

Name

LEGAL NAME OF OWNER OF CABLE SYSTEM: Give the name exactly as it appears in space 8, line 1 (page 1)

SAINT CROIX CABLE TV 003842

6

Imputation of
3.75 Fee

INSTRUCTIONS: Block A must be completed.

In block A:

• If your answer is "Yes", leave the remainder of part 6 and part 7 of the DSE Schedule blank and complete part 8. (page 16) of the Schedule.

• If your answer is "No", complete blocks B and C below.

BLOCK A: TELEVISION MARKETS

Is the "cable system" located wholly outside of all major and smaller markets as defined under FCC rules and regulations in effect on June 24, 1981?

☐ Yes—Complete part 8 of the Schedule—DO NOT COMPLETE THE REMAINDER OF PART 6 AND 7.☐ No—Complete blocks B and C below.

BLOCK B: CARRIAGE OF PERMITTED DSEs

Column 1:
CALL SIGN List the call signs of distant stations listed in part 2, 3, and 4 of this Schedule that your system was "permitted" to carry under FCC rules and regulations prior to June 25, 1981. (Note: for further explanation of "permitted station" see Instructions for the DSE Schedule.)Column 2:
BASIS OF PERMITTED CARRIAGE Enter the appropriate letter indicating the basis on which you carried a "permitted station". (Note the FCC rules and regulations cited below pertain to those in effect on June 24, 1981.)
A Stations carried pursuant to the FCC "market quota" rules (76.57, 76.59(b), 76.61(b)(c), 76.63(a) referring to 76.61(b)(c))
B Specialty Station as defined in 76.5(kk) (76.59(d)(1), 76.61(e)(1), 76.63(a) referring to 76.61(e)(1))
C Noncommercial Educational Station (76.59(c), 76.61(d), 76.63(a) referring to 76.61(d))
D Grandfathered Station (76.65) (see paragraph regarding Substitution of Grandfathered Stations in the Instructions for DSE Schedule).
E Carried pursuant to individual waiver of FCC rules (76.7)
F A station previously carried on a part-time or substitute basis prior to June 25, 1981
G Commercial UHF Station within Grade-B contour (76.59(d)(5), 76.61(e)(5), 76.63(a) referring to 76.61(e)(5))Column 3:
List the DSE for each distant station listed in parts 2, 3, and 4 of the Schedule. (Note: For those stations identified by the letter "F" in column 2, you must complete the worksheet on page 14 of this Schedule to determine the DSE.)

1. CALL SIGN	2. PERMITTED BASIS	3. DSE	1. CALL SIGN	2. PERMITTED BASIS	3. DSE	1. CALL SIGN	2. PERMITTED BASIS	3. DSE
WTBS	A/B	1.0						
WGN	B	1.0						
WOR	B	1.0						
WRAL	B	1.0						
WNBC	B	1.0						

• SUM OF PERMITTED DSEs—add the DSEs of each station

BLOCK C: COMPUTATION OF 3.75 FEE

Line 1: Enter the total number of DSEs from part 5 of this Schedule. 3.50

Line 2: Enter the "SUM OF PERMITTED DSEs" from block B above 3.50

Line 3: Subtract line 2 from line 1. This is the total number of DSEs subject to the 3.75 rate.
(If zero, leave lines 4-7 blank and proceed to part 7 of this Schedule) 0

Line 4: Enter "Gross Receipts" from space K (page 7) \$ 710,577.79

Line 5: Multiply line 4 by .0375 and enter sum here \$ 26,646.67

Line 6: Enter total number of DSEs from line 3 0

Line 7: Multiply line 6 by line 5 and enter here and on line 2, block 4, space L (page 7) \$ 0

BEST AVAILABLE COPY

LEGAL NAME OF OWNER OF CABLE SYSTEM:

SAINT CROIX CABLE TV 003842

Name _____

WORKSHEET FOR COMPUTING THE DSE SCHEDULE FOR PERMITTED PART-TIME AND SUBSTITUTE CARRIAGE

Instructions: You must complete this worksheet for those stations identified by the letter "F" in column 2 of block 8, part 6 (i.e. those stations carried prior to June 25, 1981 under former FCC rules governing part-time and substitute carriage.)

Column 1: List the call sign for each distant station identified by the letter "F" in column 2 of part 6 of the OSE Schedule.

Column 2: Indicate the DSE for the station for a single accounting period, occurring between January 1, 1978 and June 30, 1981.

Column 3: Indicate the accounting period and year in which the carriage and DSE occurred, (e.g., 1981/1).

Column 4: Indicate the basis of carriage on which the station was carried by listing one of the following letters:

(Note that the FCC rules and regulations cited below pertain to those in effect on June 24, 1981.)

A—Part-time specialty programming: Carriage, on a part-time basis, of specialty programming under FCC rules, sections 78.55(d)(1), 78.61(e)(1), or 78.63 (referring to 78.61(e)(1)).

B—Late-night programming. Carriage under FCC rules, sections 76.59(d)(3), 76.61(e)(3), or 76.63 (referring to 76.61(e)(3)).

S—Substitute Carriage under certain FCC rules, regulations or authorizations. For further explanation see page (v) of the General Instructions.

Column 5: Indicate the station's DSE for the current accounting period as computed in parts 2, 3, and 4 of this Schedule.

Column 6: Compare the DSE figures listed in columns 2 and 5 and list the smaller of the two figures here. This figure should be entered in block 8, column 3 of part 6 for this section.

IMPORTANT: The information you give in columns 2, 3, and 4 must be accurate and is subject to verification from the designated Statement of Account on file in the Licensing Division.

PERMITTED DSE FOR STATIONS CARRIED ON A PART-TIME AND SUBSTITUTE BASIS

[illegible]

INSTRUCTIONS: Block A must be completed.

In block A:

If your answer is "Yes", complete blocks B and C, below.

If your answer is "No", leave blocks B and C blank and complete part 5 of the OSE Schedule.

BLOCK A: MAJOR TELEVISION MARKET

* Is any portion of the cable system within a top 100 major television market as defined by section 78.5 of FCC rules in effect June 24, 1981? ☐ Yes—Complete blocks B and C. ☒ No—Proceed to part B

☐ Yes—Complete blocks B and C. ☒ No—Proceed to part B

BLOCK B: Cancellation of VHF/Grade B Contour Stations

Is any station listed in block B of part 6 a commercial VHF station that traces a Grade B contour, in whole or in part, over the cable system?

☐ Yes—List each station below with its appropriate permitted DSE value.

☐ No—Enter zero and proceed to part 8.[illegible]

BLOCK C: Computation of Exempt DSEs

Was any station listed in block B carried in any community served by the cable system prior to March 31, 1972? (refer to former FCC rule 76.159)

☐ Yes—List each station below with its appropriate permitted DSE value.

☐ No—Enter zero and complete block D.[illegible]

Worksheet

7

Computation of the Syndicated Exclusivity Surcharge

Name

LEGAL NAME OF OWNER OF CABLE SYSTEM

SAINT CROIX CABLE TV 003842

7

Computation
of the
Syndicated
Exclusivity
Surcharge

BLOCK D: COMPUTATION OF THE SYNDICATED EXCLUSIVITY SURCHARGE

Section 1	Enter the amount of "Gross Receipts" from space K (page 7)	\$
Section 2	A. Enter the Total DSEs from Block B	
	B. Enter the total number of exempt DSEs from Block C	
	C. Subtract line B from line A and enter here. This is the total number of DSEs subject to the surcharge computation. If zero, proceed to part 6.	

• Is any portion of the cable system within a top 50 television market as defined by the FCC?
☐ Yes—Complete section 3 below. ☐ No—Complete section 4 below.

SECTION 3: TOP 50 TELEVISION MARKET

Section 3a	<p>• Did your cable system retransmit the signals of any partially-distant television stations during the accounting period? <input type="checkbox"/> Yes—Complete part 9 of this Schedule. <input type="checkbox"/> No—Complete the applicable section below.</p> <p>If the figure in section 2 is 4,000 or less,* compute your surcharge here and leave section 3b blank.</p> <p>A. Enter .00588 of "gross receipts" (the amount in section 1)</p> <p>B. Enter .00377 of "gross receipts" (the amount in section 1)</p> <p>C. Subtract 1,000 from total permitted DSEs (the figure on line C in section 2) and enter here</p> <p>D. Multiply line B by line C and enter here</p> <p>E. Add lines A and D. This your surcharge. Enter here and on line 3 of block 4 in space L (page 7) Syndicated Exclusivity Surcharge</p> <p>*If the total DSE is less than 1,000 see the note on page 10 of the DSE instructions for computing the surcharge, part 7.</p>
Section 3b	<p>If the figure in section 2 is more than 4,000, compute your surcharge here and leave section 3a blank.</p> <p>A. Enter .00588 of "gross receipts" (the amount in section 1)</p> <p>B. Enter .00377 of "gross receipts" (the amount in section 1)</p> <p>C. Multiply line B by 3,000 and enter here</p> <p>D. Enter .00178 of "gross receipts" (the amount in section 1)</p> <p>E. Subtract 4,000 from total DSEs (the figure on line C in section 2) and enter here</p> <p>F. Multiply line D by line E and enter here</p> <p>G. Add lines A, C, and F. This is your surcharge. Enter here and on line 3, block 4, space L (page 7) Syndicated Exclusivity Surcharge</p>

SECTION 4: SECOND 50 TELEVISION MARKET

Section 4a	<p>Did your cable system retransmit the signals of any partially-distant television stations during the accounting period? <input type="checkbox"/> Yes—Complete part 9 of the Schedule. <input type="checkbox"/> No—Complete the following sections.</p> <p>If the figure in section 2 is 4,000 or less,* compute your surcharge here and leave section 4b blank.</p> <p>A. Enter .00300 of "gross receipts" (the amount in section 1)</p> <p>B. Enter .00189 of "gross receipts" (the amount in section 1)</p> <p>C. Subtract 1,000 from total permitted DSEs (the figure on line C in section 2) and enter here</p> <p>D. Multiply line B by line C and enter here</p> <p>E. Add lines A and D. This your surcharge. Enter here and in line 3, block 4, space L (page 7) Syndicated Exclusivity Surcharge</p> <p>*If the total DSE is less than 1,000 see the note on page 10 of the DSE instructions for computing the surcharge, part 7.</p>
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LEGAL NAME OF OWNER OF CABLE SYSTEM (Give the name exactly as it appears in space B, line 1, page 1)

SAINT CROIX CABLE TV 003842

Name

If the figure in section 2 is more than 4,000, compute your surcharge here and leave section 4a blank.

A. Enter .00300 of "gross receipts" (the amount in section 1) \$

B. Enter .00189 of "gross receipts" (the amount in section 1) \$

C. Multiply line B by 3,000 and enter here \$

D. Enter .00089 of "gross receipts" (the amount in section 1) \$

E. Subtract 4,000 from the total DSEs (the figure on line C in section 2) and enter here \$

F. Multiply line D by line E and enter here \$

G. Add lines A, C, and F. This is your surcharge.
Enter here and on line 3, block 4, space L (page 7)

Syndicated Exclusivity Surcharge \$

7

Computation
of the
Syndicated
Exclusivity
Surcharge

INSTRUCTIONS:

You must complete this part of the DSE Schedule if the total number of DSEs you entered in block B, part 6 is more than 1.0; however, if block A of part 6 was checked "yes," use the total number of DSEs from part 5.

- In block A, indicate, by checking "Yes" or "No," whether your system carried any partially-distant stations.
- If your answer is "No," compute your system's Base Rate Fee in block B. Leave part 9 blank.
- If your answer is "Yes" (that is, if you carried one or more partially-distant stations), you must complete part 9. Leave block B below blank.

What is a "partially-distant station?" A station is "partially-distant" if, at the time your system carried it, some of your subscribers were located within that station's local service area and others were located outside that area. A television station's "local service area" is the area within which it is "entitled to insist upon its signal being retransmitted by a cable system pursuant to rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976."

8

Computation
of
Base Rate Fee

BLOCK A: CARRIAGE OF PARTIALLY-DISTANT STATIONS

• Did your cable system retransmit the signals of any partially-distant television stations during the accounting period?

☐ Yes—Complete part 9 of this Schedule.

☐ No—Complete the following sections.

BLOCK B: NO PARTIALLY-DISTANT STATIONS—COMPUTATION OF BASE RATE FEE

Section

1

Enter the amount of "gross receipts from space K (page 7) \$ 710,577.79

Section

2

Enter the total number of permitted DSEs from block B, part 6 of this Schedule.
(If block A of part 6 was checked "yes,"
use the total number of DSEs from part 5.) 3.5

Section

3

If the figure in section 2 is 4,000 or less, compute your Base Rate Fee
here and leave section 4 blank.

A. Enter .00893 of "gross receipts" (the
amount in section 1) \$ 6,345.46

B. Enter .00563 of "gross receipts" (the
amount in section 1) \$ 4,000.55

C. Subtract 1,000 from total DSEs (the
figure in section 2) and enter here 2.5

D. Multiply line B by line C and enter here \$ 10,001.38

E. Add lines A, and D. This is your Base Rate Fee. Enter here
and in block 3, space L (page 7)
Base Rate Fee \$ 16,346.84

<p>Name</p> <p>SAINT CROIX CABLE TV 003842</p>	<p>Section 4</p> <p>If the figure in section 2 is more than 4,000, compute your Base Rate Fee here and leave section 3 blank.</p> <p>A. Enter .00883 of "gross receipts" (the amount in section 1)..... \$ _____</p> <p>B. Enter .00563 of "gross receipts" (the amount in section 1)..... \$ _____</p> <p>C. Multiply line B by 3,000 and enter here..... \$ _____</p> <p>D. Enter .00285 of "gross receipts" (the amount in section 1)..... \$ _____</p> <p>E. Subtract 4,000 from total DSEs (the figure in section 2) and enter here..... \$ _____</p> <p>F. Multiply line D by line E and enter here..... \$ _____</p> <p>G. Add lines A, C, and F. This is your Base Rate Fee. Enter here and in block 3, space L (page 7)</p> <p style="text-align: right;">Base Rate Fee </p>
--------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<p>9</p> <p>Computation of Base Rate Fee and Syndicated Exclusivity Surcharge for Partially-Distant Stations</p>	<p>In General: If any of the stations you carried was "partially-distant," the statute allows you, in computing your Base Rate Fee, to exclude receipts from subscribers located within the station's local service area from your system's total "gross receipts." To take advantage of this exclusion, you must</p> <p style="padding-left: 20px;">First: Divide all of your subscribers into "subscriber groups," each group consisting entirely of subscribers that are "distant" to the same station or the same group of stations.</p> <p style="padding-left: 20px;">Next: Treat each subscriber group as if it were a separate cable system. Determine the number of DSEs and the portion of your system's "gross receipts" attributable to that group, and calculate a separate Base Rate Fee for each group.</p> <p style="padding-left: 20px;">Finally: Add up the separate Base Rate Fees for each subscriber group. That total is the Base Rate Fee for your system.</p> <p>Important: If any portion of your cable system is located within the top 100 television market and the station is not exempt, you must also compute a Syndicated Exclusivity Surcharge for each subscriber group. In this case, complete both block A and B below. However, if your cable system is wholly located outside all major television markets, complete block A only.</p> <p>How to Identify a Subscriber Group</p> <p style="padding-left: 20px;">Step 1: Determine the local service area of each wholly-distant and each partially-distant station you carried.</p> <p style="padding-left: 20px;">Step 2: For each wholly-distant and each partially-distant station you carried, determine which of your subscribers were located outside the station's local service area. A subscriber located outside the local service area of a station is "distant" to that station (and, by the same token, the station is "distant" to the subscriber.)</p> <p style="padding-left: 20px;">Step 3: Divide your subscribers into subscriber groups according to the complement of stations to which they are "distant." Each subscriber group must consist entirely of subscribers who are "distant" to exactly the same complement of stations. Note that a cable system will have only one subscriber group when the distant stations it carried have local service areas that coincide.</p> <p style="padding-left: 20px;">Computing the Base Rate Fee for each subscriber group: Block A contains separate sections, one for each of your system's subscriber groups.</p> <p>In each section:</p> <ul style="list-style-type: none"> • Identify the communities/areas represented by each subscriber group. • Give the call sign for each of the stations in the subscriber group's complement—that is, each station that is "distant" to all of the subscribers in the group. • If: <ol style="list-style-type: none"> 1) your system is located wholly outside all major and smaller television markets, give each station's DSE as you gave it in parts 2, 3, and 4 of this Schedule; or, 2) any portion of your system is located in a major or smaller television market, give each station's DSE as you gave it in block 8, part 6 of this Schedule. • Add the DSEs for each station. This gives you the total DSEs for the particular subscriber group. • Calculate "gross receipts" from the subscriber group. For further explanation of "gross receipts" see page (vi) of the General Instructions. • Compute a Base Rate Fee for each subscriber group using the formula outline in block 8 of part 8 of this Schedule on the preceding page. In making this computation, use the DSE and "gross receipts" figure applicable to the particular subscriber group (that is, the total DSEs for that group's complement of stations and total "gross receipts" from the subscribers in that group). You do not need to show your actual calculations on the form. For each subscriber group with less than 1,000 DSE use the following formula to compute the Base Rate Fee: "Gross Receipts" x .00883 x Total DSEs for that Subscriber Group = Base Rate Fee.
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Narrative

Computation of Base Rate Fee and Syndicated Exclusivity Surcharge for Partially- Distant Stations

COMMUNITY/ AREA

DSE

1

COMMUNITY/ AREA

CALL SIGN

5

Base Rate Fee: Add the Base Rate Fees for each subscriber group as shown in the boxes above. Enter here and in block 3, spec L (page 7)

3

Name

LEGAL NAME OF OWNER OF CABLE ST

SAINT CROIX CABLE TV 003842

9

Computation
of
Base Rate Fee
and
Syndicated
Exclusivity
Surcharge
for
Partially-
Distant
Stations

BLOCK 8: COMPUTATION OF SYNDICATED EXCLUSIVITY SURCHARGE FOR EACH SUBSCRIBER GROUP

If your cable system is located within a top 100 television market and the station is not exempt, you must also compute a Syndicated Exclusivity Surcharge. Indicate which major television market any portion of your cable system is located in as defined by section 78.5 of FCC rules in effect on June 24, 1981:

☐ First 50 major television market☐ Second 50 major television market

INSTRUCTIONS:

Step 1: In line 1, give the total DSEs by subscriber group for commercial VHF Grade B contour stations listed in block A, part 9 of this Schedule.

Step 2: In line 2 give the total number of DSEs by subscriber group for the VHF Grade B contour stations that were classified as "Exempt DSEs" in block C, part 7 of this Schedule. If none enter zero.

Step 3: In line 3 subtract line 2 from line 1. This is the total number of DSEs used to compute the surcharge.

Step 4: Compute the surcharge for each subscriber group using the formula outlined in block D, section 3 or 4 of part 7 of this Schedule. In making this computation use "Gross Receipts" figures applicable to the particular group. You do not need to show your actual calculations on this form.

NOTE: If a subscriber group has less than 1.00 DSE, use the following formula to compute the surcharge. Top 50 Television Market— $\text{"Gross Receipts"} \times .00508 \times \text{Surcharge DSEs for the Subscriber Group} = \text{Syndicated Exclusivity Surcharge}$. Second 50 Television Market— $\text{"Gross Receipts"} \times .003 \times \text{Surcharge DSEs for the Subscriber Group} = \text{Syndicated Exclusivity Surcharge}$.

FIRST SUBSCRIBER GROUP

Line 1: Enter the VHF DSEs

Line 2: Enter the "Exempt DSEs"

Line 3: Subtract line 2 from line 1
and enter here. This is the
total number of DSEs for
this subscriber group
subject to the surcharge
computation

SYNDICATED EXCLUSIVITY
SURCHARGE

First Group \$

SECOND SUBSCRIBER GROUP

Line 1: Enter the VHF DSEs

Line 2: Enter the "Exempt DSEs"

Line 3: Subtract line 2 from line 1
and enter here. This is the
total number of DSEs for
this subscriber group
subject to the surcharge
computation

SYNDICATED EXCLUSIVITY
SURCHARGE

Second Group \$

THIRD SUBSCRIBER GROUP

Line 1: Enter the VHF DSEs

Line 2: Enter the "Exempt DSEs"

Line 3: Subtract line 2 from line 1
and enter here. This is the
total number of DSEs for
this subscriber group
subject to the surcharge
computation

SYNDICATED EXCLUSIVITY
SURCHARGE

Third Group \$

FOURTH SUBSCRIBER GROUP

Line 1: Enter the VHF DSEs

Line 2: Enter the "Exempt DSEs"

Line 3: Subtract line 2 from line 1
and enter here. This is the
total number of DSEs for
this subscriber group
subject to the surcharge
computation

SYNDICATED EXCLUSIVITY
SURCHARGE

Fourth Group \$

SYNDICATED EXCLUSIVITY SURCHARGE: Add the surcharge for each subscriber group as shown
in the boxes above. Enter here and in block 4, line 3 of space L (page 7)

\$

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WILLIAM G. HOWARD
1846-1908
HARRY C. HOWARD
1871-1948
WILLIAM J. HOWARD
1904-1993

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MICHIGAN ONLY EXCEPT AS INDICATED
* ALSO ADMITTED IN DISTRICT OF COLUMBIA
* ALSO ADMITTED IN ILLINOIS
* ALSO ADMITTED IN INDIANA
* ALSO ADMITTED IN IOWA
* ALSO ADMITTED IN KANSAS
* ALSO ADMITTED IN MASSACHUSETTS
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* ALSO ADMITTED IN TEXAS
* ALSO ADMITTED IN VIRGINIA
* ALSO ADMITTED IN WISCONSIN
* ALSO ADMITTED IN ARIZONA
* ALSO ADMITTED IN CALIFORNIA
* ALSO ADMITTED IN FLORIDA
* ADMITTED TO PRACTICE BEFORE THE
FEDERAL AND TRADEMARK OFFICE

Reply to: Lansing
Direct Dial: (517) 377-0611

August 29, 1996

Ms. Marilyn J. Kretsinger
Acting General Counsel
United States Copyright Office
Library of Congress
Copyright GC/1&R
Washington, D.C. 20024

Re: St. Croix Cable TV/Request for Adjustment to Distant Signal Rules as
Applied to U.S. Virgin Islands

Dear Ms. Kretsinger:

With this letter, Howard & Howard requests that the Office of General Counsel provide guidance and possibly an adjustment to Copyright Office policy in one narrow area of the application of the compulsory license - specialty stations in U.S. territories. Before submitting this request, we have consulted on several occasions with Ms. Patricia Sinn of your office. Ms.

Ms. Marilyn J. Kretsinger

August 29, 1996

Page 2

Sinn's assistance has been invaluable in orienting our analysis. At the outset of this request, we communicate our appreciation for her assistance.

Howard & Howard represents St. Croix Cable TV ("St. Croix Cable"). In that capacity, we submit this request for an adjustment to the Copyright Office's interpretation of 17 USC § 111 as applied to cable operators in the U.S. Virgin Islands. Specifically, St. Croix seeks to receive similar copyright royalty treatment for distant broadcast signals as cable operators in nearby Puerto Rico.

A. The Problem: Disparate copyright royalty treatment of St. Croix Cable results in increased costs and decreased programming diversity in the U.S. Virgin Islands.

St. Croix Cable currently pays at least 100% more in copyright royalties than similarly situated Puerto Rico systems. This directly results in substantially higher costs for cable customers on St. Croix. As a consequence, St. Croix cable cannot cablecast as many distant signals as Puerto Rico cable systems. This situation reduces programming diversity in the U.S. Virgin Islands. St. Croix Cable's customers cannot afford the additional fees required to import the number of superstations enjoyed by many Puerto Rico cable customers.

When the cost of copyright royalties in St. Croix is compared to such costs in Puerto Rico, where cable operators and subscribers pay no 3.75% fee, the disparate burden placed on residents of the U.S. Virgin Islands becomes obvious.

B. The Solution: U. S. Virgin Islands cable systems should receive the same copyright royalty treatment as Puerto Rico cable systems.

St. Croix Cable asks that the Copyright Office afford cable operators in the U.S. Virgin Islands copyright royalty treatment like that received by Puerto Rico cable operators. In doing so, the Copyright Office will recognize the substantial similarity between the U.S. Virgin Islands and Puerto Rico as well as demonstrating sensitivity to the unique characteristics of United States island territories. The Copyright Office will also significantly contribute to the promotion of the important public policy goal of increased programming diversity, while still ensuring that copyright holders are compensated. The Copyright Office has ample authority to make this pragmatic adjustment to its rules and policies. Fundamental fairness will be served by such an adjustment in this case.

C. The Copyright Office is the proper administrative agency to receive this request.

As a threshold matter, we recognize that treating a specialty station as a permitted signal springs from indirect application of former Federal Communication Commission ("Commission") regulations to the compulsory licensing process. Because we seek an interpretation of the

application of these regulations, we understand that the Copyright Office might consider passing the issue to the Commission.

To ascertain if the Commission would act upon our request, we conferred with Mr. William Johnson, Deputy Chief, Cable Services Bureau. Mr. Johnson, after conferring with Bureau Chief Meredith Jones, indicated that the Cable Services Bureau would not entertain a request to interpret the application of 47 C.F.R. § 76.5 (kk) (1981) or the Commission's former market quota rules. According to Mr. Johnson, the Bureau could not devote resources to considering former regulations that it no longer applied. Understandably, interpretation of current rules and promulgation of new rules has the Bureau more than fully occupied. We attach correspondence confirming our conversation with the Cable Services Bureau.¹

The Copyright Office itself has recognized that the Commission is no longer involved in specialty station questions.² Determinations of the application of specialty station status to the compulsory license remain within the Copyright Office's jurisdiction as shown by the Copyright Office's specialty station affidavit procedure. Consequently, the Copyright Office is the only appropriate agency to receive this request. Administrative efficiency and fundamental fairness support interpretation of a rule or policy by the agency that applies it.

D. Background.

1. The island of St. Croix.

St. Croix is the largest island in the U.S. Virgin Islands and encompasses 84 square miles. Population totals 51,300. St. Croix lies less than 60 miles southeast of Puerto Rico. The annual medium income per household on St. Croix is \$22,050, substantially below that of the United States.³

St. Croix's economy reflects the lower level of development of Puerto Rico and other island territories. In addition, devastating hurricanes have further hindered economic development.

¹See Exhibit 1, August 28, 1996 letter to Meredith Jones from Eric Breisach.

²See e.g., Notice, Docket No. RM 94-4, Cable Compulsory License: Specialty Station List, 60 Fed. Reg. 4639 ("Although specialty station status is determined by reference to former FCC regulations found at 47 CFR 76.5 (kk) (1981), the FCC no longer determines whether a station qualifies as a specialty station. The last time the FCC identified specialty stations was in 1976.")

³Bureau of the Census, U.S. Department of Commerce, 1990 Census of Population, Social and Economic Characteristics, Urbanized Areas 24, 403 (1993) (annual medium income per U.S. household - \$30,005).

In 1989 hurricanes destroyed 90% of the island's buildings and left nearly half of its population homeless. The 1994 and 1995 hurricane seasons were also very destructive.

The St. Croix population reflects substantial ethnic and linguistic diversity. Less than half of all U.S. Virgin Island residents are native born. St. Croix's population is primarily African-American. While English is the official language, many citizens speak other languages or dialects. A primary spoken language in St. Croix is also the West Indian dialect Calypso.⁴ The number of residents migrating from Puerto Rico has also steadily increased in recent years. An estimated 7,300 persons on St. Croix indicate that Spanish is their primary language.⁵

2. St. Croix Cable.

St. Croix Cable serves as the primary multichannel video programming distributor on St. Croix. A family-run business, St. Croix Cable began operations in 1981 and now serves about 13,000 customers on St. Croix. Only one network affiliate and one educational channel are available off-air in St. Croix. Consequently, St. Croix residents rely on cable television for nearly all news, educational and entertainment programming.

3. St. Croix Cable's current copyright situation.

St. Croix Cable currently cablecasts nine broadcast channels.⁶ Four of these signals are local signals⁷ and include the only channel of network programming available in St. Croix. St. Croix Cable imports five distant signals, including two network affiliates and three superstations. Because St. Croix Cable serves a smaller television market, it may carry only one independent

⁴29 The New Encyclopedia Britannica 776 (15th ed. 1993).

⁵Statistical Abstract of U.S., 1993, U.S. Dept. of Commerce, Economic and Statistics Administration, Bureau of the Census; Worldstream, February 27, 1995.

⁶These are: WKAQ, San Juan, PR; WAPA, San Juan, PR; WSVI, Christiansted, VI; WTJX, Charlotte Amalie, VI; WTBS, Atlanta, GA; WGN, Chicago, IL; WWOR, Secaucus, NJ; WRAL, Raleigh Durham, NC; WXIA, Atlanta, GA.

⁷Although characterized as local signals, three of these signals are located on other islands and are not available off-air.

Ms. Marilyn J. Kretsinger

August 29, 1996

Page 5

television station on a permitted basis.⁸ Consequently, St. Croix Cable currently pays the 3.75% fee on 2.00 DSEs due to the two non-permitted independents.⁹

The economic impact is substantial for a small island cable system. For the 95/1 reporting period, St. Croix Cable paid \$64,651.05 in copyright royalties on gross receipts of \$745,299.96.¹⁰ This resulted in an average annual royalty fee per subscriber of \$10/year or \$0.83/month. About 86% of this liability arose from the 2.00 DSEs attributable to the two imported superstations. For many subscribers, copyright royalties represent nearly 10% of the cost of cable service.

St. Croix Cable subscribers would like to receive four superstations as many subscribers do in Puerto Rico. To do so, St. Croix Cable and its customers would have to pay a disproportionately high marginal increase in copyright royalties. Exhibit 3 shows a pro forma SA3 based on St. Croix Cable's 95/1 SA3. Carriage of WPIX is added to the DSE schedule. WPIX is a popular superstation carried on many Puerto Rico cable systems.

The addition of one superstation would increase copyright royalties by nearly 50%. Costs associated with the additional 3.75% fee would add \$2.50 per subscriber per reporting period, for a total of \$14.18 per year, more than the cost of basic service for one month. St. Croix Cable's situation contrasts significantly with that of Puerto Rico cable operators.

E. U.S. Virgin Islands/Puerto Rico copyright royalty comparison.

1. Puerto Rico Cable operators pay substantially lower copyright royalties.

Exhibits 4-6 are 94/2 SA3s for three Puerto Rico cable operators. Two of the systems carry four superstations, one carries three. Each of the systems pays substantially less in copyright fees than St. Croix. This is the case even though the Puerto Rico systems may carry more distant broadcast signals and earn higher gross receipts. The chart below demonstrates this disparity.

⁸47 CFR 76.59(b) (1981).

⁹See Exhibit 2, St. Croix Cable TV, 95/1 SA3, p. 13.

¹⁰See Exhibit 2, p. 7.

**U.S. VIRGIN ISLANDS/PUERTO RICO CABLE TELEVISION
COPYRIGHT ROYALTY COMPARISON**

Cable System/ Reporting Period	Subs	Gross Receipts	Distant Signals Carried	Super- stations Carried	Total Royalties Paid	Average Royalty Per Sub Per Month	Average 3.75 fee per sub per month
St. Croix Cable, USVI, 95/1	12,932	\$ 745,300	5	WTBS, WGN, WWOR	\$ 64,651	\$ 0.83	\$ 0.72
TCI Cablevision of PR, 94/2	43,872	\$4,579,441	6	WTBS, WGN, WWOR	\$111,796	\$ 0.42	\$ 0.00
WHTV Broadcasting Corp, PR, 94/2	4,106	\$ 572,474	7	WTBS, WGN, WWOR, WPIX	\$ 15,919	\$ 0.65	\$ 0.00
Cable Systems USA Partners, PR, 94/2	19,706	\$2,865,874	7	WTBS, WGN, WWOR, WPIX	\$ 79,692	\$ 0.67	\$ 0.00
St. Croix Cable, USVI (assuming carriage of WPIX)	12,932	\$ 753,056	6	WTBS, WGN, WWOR, WPIX	\$ 93,564	\$ 1.21	\$ 1.09

As shown above, to carry the same four superstations as Cable Systems USA Partners, St. Croix Cable subscribers would have to pay about \$14,000 more in copyright royalties on about \$2.1 million less in gross receipts. Similarly, St. Croix Cable would have to pay over \$77,600 more in copyright royalties than WHTV Broadcasting Corp. when gross receipts differ by only \$180,500. The impact on subscribers is severe. St. Croix Cable customers would have to pay nearly twice as much per month in copyright royalties for the same number of broadcast stations.

2. All distant signals are considered specialty stations in Puerto Rico.

Puerto Rico cable systems are permitted to treat all distant signals as permitted specialty stations.¹¹ Puerto Rico cable systems may claim specialty station status for stations other than

¹¹See p. 13, exhibits 4-6.

those listed as specialty stations by the Copyright Office.¹² Consequently, no 3.75% fee accrues. For Puerto Rico cable systems, the Copyright Office has made a pragmatic adjustment to its rules.

To St. Croix Cable, this appears to be a sensible accommodation of the unique characteristics of one U.S. island possession. Off-air programming is extremely limited. A substantial Spanish-speaking population exists. Income levels are significantly below those in the United States. All these reasons support the current copyright royalty treatment of Puerto Rico cable operators.

St. Croix Cable asks that the Copyright Office extend such treatment to U.S. Virgin Islands cable operators. The foreign language analysis could be applied to St. Croix, where a principal spoken language is the Calypso dialect and many residents speak Spanish. More importantly, the essential public interest in programming diversity weighs heavily in favor of according the U.S. Virgin Islands cable systems copyright treatment similar to Puerto Rico.

F. Law and public policy warrant affording U.S. Virgin Islands cable operators the same copyright royalty treatment as cable operators in Puerto Rico.

1. Copyright Office has authority to make pragmatic adjustments to its rules.

The Copyright Office has ample authority to adjust its rules in this context. The law has long provided administrative agencies, like the Copyright Office, discretion in discharging their statutory duties.¹³ This discretion includes adapting policies and practices to particular circumstances.¹⁴ Such administrative discretion should be exercised according to established principles of fairness and justice.¹⁵ Consequently, the Copyright Office has ample discretion to consider the unique economic, cultural and geographic circumstances of St. Croix Cable and other U.S. island territories and acknowledge that distant signals should receive the same copyright treatment in the U.S. Virgin Islands as in Puerto Rico.

¹²See, e.g. Cable Compulsory License: Specialty Station List, 60 Fed. Reg. 24659 (May 9, 1995).

¹³See e.g., *ICC v Parker*, 326 U.S. 60, 65 (1944).

¹⁴*Permian Basin Area Rate Cases*, 390 U.S. 747, 777 (1968) (agencies may make pragmatic adjustments to rules).

¹⁵*American Lines v Black Ball Freight Service*, 397 U.S. 532, 539 (1970) ("[I]t is always within the discretion of a court or administrative agency to relax or modify such rules . . . when in a given case the ends of justice require it"); *Dana Corp. v. ICC*, 703 F.2d 1297, 1300 (D.C. Cir. 1983).

The D.C. Circuit has expressly recognized the authority of the Copyright Office to develop evolving interpretations of 17 USC § 111:

The Copyright Office certainly has greater expertise in such matters than do the federal courts; and while watching over the cable industry may have been a novel brief for the Copyright Office when the new Act was passed, that agency has had time to accumulate experience.¹⁶

The Copyright Office's accumulating experience must include an understanding of the disparate impact of Copyright Office specialty station policy on the U.S. Virgin Islands. "Congress saw a need for continuing interpretation of Section 111 and thereby gave the Copyright Office statutory authority to fill that role."¹⁷ The Copyright Office will fulfill this role by interpreting Section 111 for the U.S. Virgin Islands as it does for neighboring Puerto Rico.

2. The Commission has recognized that the U.S. Virgin Islands and other territories require special treatment on broadcast signal carriage issues.

Commission precedent supports aligning specialty station treatment for U.S. Virgin Islands with that received by Puerto Rico. During the time that the Commission considered specialty station issues, it made clear that cable systems in U.S. territories should receive special consideration. The Commission specifically identified the U.S. Virgin Islands as a region necessitating special treatment. Furthermore, the Commission has stated that the specialty station rules were promulgated to promote programming diversity, not merely to promote foreign language programming. The Copyright Office will remain well within this precedent by recognizing specialty station status for distant signals in the U.S. Virgin Islands, just as it has for Puerto Rico.

As early as 1972, the Commission indicated that its cable regulations were designed for the 48 contiguous states and that territories, including the U.S. Virgin Islands, should receive special consideration.¹⁸

[W]e believe it appropriate on our own motion that some additional consideration be given to the applicability of the rules to cable systems operating in Alaska, Puerto Rico, Hawaii, and other areas not included within the 48 contiguous states. Because of the unique situation with respect to broadcasting and cable television in these areas we believe some special consideration. Thus, for example, it is

¹⁶*Cablevision Systems Development v. Motion Picture Ass'n. of America, Inc.*, 836 F.2d 599, 608-609 (D.C. Cir. 1988).

¹⁷*Id.* at 610 (emphasis added).

¹⁸*Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order*, 36 FCC2d 326 (1972). ¶ 122.

clear that Section 76.59(d) of the rules regulating carriage of non-English language stations could not be applied literally in Puerto Rico where most of the stations regularly broadcast in the Spanish language. Alaska . . . is characterized by geographical remoteness from the contiguous states, has vast area and small population. There are only a few existing television stations and cable television systems, and in some instances both the television station and the cable system in the same community receive their programming on tape. Neither Hawaii nor Puerto Rico has distant signal programming readily available, and both have major cities where it could be argued our access rules should apply. It is likely that other areas such as the Virgin Islands are likewise dissimilar from otherwise comparable areas within the 48 states. Because of the peculiar circumstances with respect to cable in these areas we believe it appropriate to treat certificate of compliance applications from these area on an ad hoc basis . . . We believe this is an appropriate method of proceeding, since these areas are not likely to be strictly comparable to those areas for which the rules were designed.¹⁹

The Commission later adjusted its application of specialty station and other rules for Puerto Rico in recognition of the special circumstances of cable systems located outside of the contiguous 48 states.²⁰ The Commission allowed carriage of distant signals in Puerto Rico as specialty stations because "such carriage almost invariably increase the diversity of the programming available to cable subscribers without diminishing the local stations' ability to serve the public."²¹ Again, the Commission made this ad hoc adjustment to its rules because those rules "were designed with the characteristics of the forty-eight contiguous states in mind."²² The Copyright Office will serve precisely the same interests by granting either specialty station or market quota flexibility to U.S. Virgin Islands cable systems.

3. The adjustment will promote the important public policy goal of increased programming diversity.

The current disparate treatment of U.S. Virgin Islands cable systems adversely impacts programming diversity. Cable customers on St. Croix cannot afford the substantial copyright costs of additional distant signals. Cable customers on nearby Puerto Rico enjoy more diverse programming at significantly lower cost. By treating U.S. Virgin Island cable operators and subscribers the same as their Puerto Rico counterparts, the Copyright Office will eliminate the

¹⁹*Id.*

²⁰*Cable Television of Puerto Rico*, 46 FCC2d 1096 (1974), ¶ 4 (intent of specialty station rules "was clearly to promote diversity of programming"); *Cable Television of Puerto Rico*, 68 FCC2d 609 (1978).

²¹68 FCC2d 609, ¶ 7.

²²*Id.* at ¶ 2.

Ms. Marilyn J. Kretsinger

August 29, 1996

Page 10

economic disincentive to cablecast additional distant signals in the U.S. Virgin Islands. The substantial public interest in programming diversity provides ample policy support for this application of 17 USC § 111.

Congress has provided clear direction on the vital public interest in programming diversity.

There is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media.

* * *

It is the policy of this Congress in this Act to -- . . . promote the availability to the public of a diversity of views and information through cable television and other video distribution media.²³

Similarly, the courts and the Commission have long emphasized the importance of diverse programming.

The public welfare requires the Commission to provide the 'widest possible dissemination of information from diverse and antagonistic sources' and to guard against undue concentration of control of communications power.²⁴

Recently, the Commission underscored the fundamental importance of diverse programming, "Furtherance of diversity and competition remains the cornerstone of Commission regulation."²⁵ The Copyright Office should continue to align its policies to support programming diversity. For Puerto Rico, it has already done so. Puerto Rico cable subscribers can access more mainland programming at a lower cost. To increase programming diversity in the U.S. Virgin Islands, the Copyright Office must extend this policy to include those island territories adjacent to Puerto Rico.

²³1992 Cable Act § 2(a)(6) and (b)(1).

²⁴*Joseph v. FCC*, 404 F.2d 207, 211 (D.C. Cir. 1968) citing *Associated Press v. United States*, 326 U.S. 1, 20 (1945) and *Scripps-Howard Radio, Inc. v. FCC*, 189 F.2d 677, 683, cert. denied, 342 U.S. 830 (1951). See also, *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978).

²⁵*Notice of Proposed Rulemaking*, MM Docket No. 95-92, FCC 95-254 (released June 15, 1995) at ¶ 7 (emphasis added). See also *In re Hopkins Hall Broadcasting, Inc.*, *Memorandum Opinion and Order*, FCC 95-331 (released September 5, 1995) at ¶ 10, n. 5, citing *Associated Press v. U.S.*, 326 U.S. at 20.

4. Treating U.S. Virgin Islands cable systems like those in Puerto Rico will have a de minimis impact on copyright owners.

In addition to promoting programming diversity, the interpretation sought here will not conflict with the duties of the Copyright Office in implementing 17 USC § 111. Most broadly, the purpose of Section 111 is to structure an efficient mechanism for compensation of copyright owners for non-network programs cablecast far from the original area of broadcast.²⁶ The interpretation of the Copyright Office rules and policy requested here will not impede the achievement of this purpose because the change will have a de minimis impact on copyright owners for several reasons.

First, St. Croix Cable serves a tiny fraction of U.S. cable subscribers. There are currently 61,700,000 cable subscribers in the U.S.²⁷ St. Croix Cable serves only 2/100 of 1% the nation's subscribers. The other cable systems in the U.S. Virgin Islands serve even fewer subscribers. Any adjustment to Copyright Office rules that would affect royalty payments from the U.S. Virgin Islands will not create a statistically significant impact on aggregate royalties received by copyright owners.

Any slight impact on copyright owners is further ameliorated by payments St. Croix Cable must already make to cablecast distant signals. St. Croix Cable must pay affiliate fees to each superstation carried. This is not a case where a cable operator "bootlegs" via microwave a distant signal. St. Croix is obligated under carriage agreements to pay for the entitlement to access satellite transmissions of superstations. The copyright holders are already being compensated. Superstations also earn substantial revenue from national advertising sales.²⁸

As a result of increased advertising revenue and affiliate fees that cable operators must pay, the likelihood of undercompensation of copyright owners is negligible if U.S. Virgin Islands cable operators receive the same copyright treatment as those in Puerto Rico.

G. Conclusion.

Existing Copyright Office policy results in a tiny minority of U.S. cable subscribers bearing a disparate economic burden for access to distant signals. U.S. Virgin Islands cable

²⁶*Cablevision Systems Development Co.*, 836 F.2d at 603.

²⁷Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, *Order and Notice of Proposed Rulemaking*, CS Dock. No. 96-85, FCC 96-154 (rel. April 9, 1996), ¶ 26.

²⁸*Cablevision Systems Development Co.*, 836 F.2d at 603. ("Because national advertisers will pay to reach any incremental viewer, networks will be willing and able to pay copyright holders the full value placed on the receipt of the program by viewers.")

Ms. Marilyn J. Kretsinger

August 29, 1996

Page 12

operators and subscribers paying substantially higher copyright royalties than their counterparts in nearby Puerto Rico. The U.S. Virgin Islands share with Puerto Rico the characteristics of ethnic and linguistic diversity, significant population segments where English is not the primary spoken language, low economic development compared to the United States, and extremely limited off-air programming. These factors support specialty station treatment for distant signals in Puerto Rico. These same factors should result in identical treatment for distant signals in the U.S. Virgin Islands.

By interpreting 17 USC § 111 and the applicable rules to apply similarly to all U.S. island territories, the Copyright Office will eliminate the current disparate burdens imposed on U.S. Virgin Islands cable customers and will enhance programming diversity in a region where distant signals are essential.

Sincerely,

HOWARD & HOWARD


Christopher C. Cinnamon

cc: St. Croix Cable TV
Eric E. Breisach

U26/cc/stcroix/stcroix.896

HOWARD & HOWARD
ATTORNEYS

RECEIVED
FEB 24 1997

February 14, 1997



Re: St. Croix Cable TV Request

Dear Mr. Cinnamon:

LIBRARY
OF
CONGRESS

I am responding to your letter dated August 29, 1996, regarding specialty stations in U.S. territories, and specifically, your request for "an adjustment to the Copyright Office's interpretation of 17 USC § 111 as applied to cable operators in the U.S. Virgin Islands." Your request is made on behalf of your client, St. Croix Cable TV (St. Croix Cable). In your letter, you ask that St. Croix Cable be treated similarly to cable operators in Puerto Rico regarding carriage of distant signals as specialty stations. The Copyright Office considered your request, examined the accompanying documentation, and conducted its own research. The Office determined that it cannot modify St. Croix's distant signal carriage obligations under 17 U.S.C. § 111.

Washington
D.C.
20559

I. St. Croix Cable claims that the Copyright Office is the proper administrative agency to receive this request.

A. Copyright Office authority and procedures.

The Copyright Office is the agency charged with the administration of the cable compulsory license, 17 U.S.C. § 111, which significantly references Federal Communications Commission (FCC) rules regulating the cable industry. In an effort to update the FCC specialty station list, the Office adopted procedures for periodically compiling a specialty station list in 1989,¹ basing qualification for specialty station status on former FCC rules.²

As you know, the FCC regulations at 47 C.F.R. § 76.5(kk) are no longer in effect. However, specialty station status is significant in the administration of the cable compulsory license by the Copyright Office because a cable system may carry the signal of a television station classified as a specialty station at the relevant

¹ 54 FR 38461 (Sept. 18, 1989).

² 47 CFR 76.5(kk)(1976).

non-3.75% royalty rate for "permitted" signals. The Office understands that this set of circumstances presents your client with a dilemma as to which agency can grant St. Croix Cable's request. The FCC no longer considers questions relating to specialty station status; the Copyright Office does not have the authority to grant exceptions to the former FCC rules even if the rules are relevant to 17 U.S.C. § 111.

B. Who may file for specialty station status.

To recognize individual broadcast television stations' specialty station status for the record, the Office requires that stations file affidavits attesting to that status, and retains the affidavits in its public files so that Licensing Division examiners, copyright owners, and general members of the public may refer to them in connection with claims to specialty station status. Broadcast stations may request placement on the specialty station list; cable systems that carry these stations list them as specialty stations on their semi-annual statements of account, filed with the Office pursuant to 17 U.S.C. § 111.

Specialty station status may be requested by broadcast television station operators, not by cable operators. You write that St. Croix Cable would like to carry another (a fourth) superstation, but cannot afford to do so because the increase in royalty payments would be too burdensome. You point out that cable systems in Puerto Rico have a lighter burden due to the FCC's 1974 ruling.

You indicate that the fourth superstation St. Croix Cable would carry would likely be WPIX, New York. WPIX has not filed an affidavit with the Office attesting to specialty station status. In addition, as an English language station carried in a territory where English is the official language, specialty station status would not be proper or appropriate for WPIX if it were carried in St. Croix.

II. U.S. Virgin Islands cable systems should receive the same copyright royalty treatment as Puerto Rico cable systems.

In 1985, the Copyright Office examined the question of classification of English language stations as specialty stations in Puerto Rico and in other parts of the United States, and whether English language stations may be carried as specialty stations in U.S. territories where English is a foreign language.

Although the FCC granted special status to Puerto Rican cable systems, it did not issue an overall decision regarding importation of English language stations into areas of the United States other than Puerto Rico. At the time the FCC's

decision about distant signal carriage in Puerto Rico was made, English was classified as a foreign language there, and distant English language stations could be carried as specialty stations based on the fact that English language programming was "foreign" language programming in an area that still officially was Spanish speaking.³

The FCC interpretation was in effect on June 24, 1981, and remained applicable to cable carriage in Puerto Rico under 17 U.S.C. § 111. The FCC had no general, settled policy on the importation issue as of June 24, 1981. Because the FCC's Puerto Rico ruling was an ad hoc decision, the Office declines to extrapolate from that decision to apply it to other situations or other areas of the United States. The Copyright Office does not have authority to apply the FCC's adjustment to Puerto Rico systems' distant carriage requirements to any area other than Puerto Rico with respect to the 3.75% non-permitted royalty rate.

III. Disparate copyright royalty treatment of St. Croix Cable results in increased costs and decreased programming diversity in the U.S. Virgin Islands.

You mention that your request could be granted by adjusting the distant market signal quota for St. Croix, so that St. Croix Cable and its subscribers would be treated as Puerto Rican cable systems and subscribers are treated. The request would be granted in the interests of fairness and program diversity. The Office does not adjust signal carriage quotas under § 111. Cable operators may adjust payment of royalties for distant signal carriage if and when the relevant market changes, or in cases of merger and acquisition of systems. It appears that no such situation has occurred in relation to St. Croix Cable.

Issues pertaining to program diversity are not within the Office's purview. The Office is not authorized to regulate program content. Copyright compulsory licensing laws were written with the Congressional intent of assuring copyright owners fair compensation for uses of their works that would occur beyond the scope of their abilities to negotiate.⁴

³ In Re Application of Cable Television Co., of Puerto Rico, San Juan, Puerto Rico For Certificate of Compliance and Request for Order to Show Cause 49 F.C.C. 2d 617 (1974); In Re Application of Cable Television Company of Puerto Rico d/b/a Cable TV Puerto Rico, Metropolitan San Juan, Puerto Rico For Certificate of Compliance 68 F.C.C. 2d 609 (1978).

⁴ H. Rep. No. 1476, 94th Cong., 2d Sess. 89 (1976).

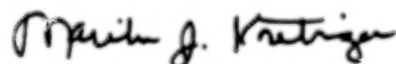
Administration of section 111 involves "the complex and economically important problem of 'secondary transmissions'...."⁵ When receiving and filing affidavits from broadcast stations claiming specialty station status, the Office does not engage in a comparative process designed to measure program content, equalize subscriber fees, analyze demographics, or promote or ensure diversity of cultural content. These activities are not part of the Office's legal responsibilities. Therefore, the Office cannot grant St. Croix Cable TV's request based on concerns of program diversity or disparity in cable subscriber fees in different parts of the United States.

IV. Conclusion

On February 6, 1997, the Office received a letter from Senator Orin Hatch, Chairman of the United States Senate Committee on the Judiciary, requesting that the copyright compulsory licenses be reviewed for possible reform. The emphasis was on section 119, the Satellite Home Viewer Act, but there is also concern about reform in the cable compulsory license, section 111. As part of its review, the Office will probably ask for comments from interested parties, and St. Croix Cable TV would be able to comment further at that time.

The Office must apply its policy and regulations. We do not have the authority to grant St. Croix Cable TV's request to receive similar copyright royalty treatment for distant broadcast signals as cable operators in Puerto Rico.

Sincerely,



Marilyn J. Kretsinger
Assistant General Counsel

Mr. Christopher C. Cinnamon
Howard & Howard
The Phoenix Building, Suite 500
222 Washington Square, North
Lansing, MI 48933-1817

⁵ *Id.* at 88.

HEMINGFORD CO-OPERATIVE TELEPHONE CO.



GENERAL COUNSEL
OF COPYRIGHT

April 22, 1997

HEMINGFORD, NEBRASKA 69348

APR 28 1997

RECEIVED

Ms. Nanette Petruzzelli, Acting General Counsel
Copyright GC/I&R
P.O. Box 70400
Southwest Station
Washington, DC 20024

Comment Letter

RM 97-1

No. 2

Dear Ms. Petruzzelli,

This letter is written to inform you of the Hemingford Cooperative Telephone Company's viewpoint on the Revision of Cable and Satellite Carrier Compulsory Licenses.

The Hemingford Cooperative Telephone Company is a small rural local exchange company serving 900 telephone customers, 500 direct satellite subscribers, and 300 internet subscribers. We are located in a community of 1000 people in rural Nebraska.

The following comments are specifically addressed to the so-called "white area" restriction of retransmission of television network stations.

Current restrictions are not necessary and are not appropriate in today's rural markets. Restrictions limit consumers and advertisers choices and access to new technology. For example, consider that most consumers in rural Nebraska only have access to one or two channels and these are often poor quality "snowy" pictures at the best. By disallowing satellite and cable operators to provide network signals, subscribers are left with little or no choices.

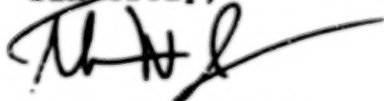
Grade B signal intensity is not an appropriate measure because digital technology has raised the standard in picture quality. Requiring a low standard of reception only discourages investment in technology upgrades.

Competition provides consumers many options and assists technology deployment. By allowing other carriers to provide network signals, consumers benefit from the variety offered through competition. Local network affiliates as well as cable and satellite carriers that compete in any area will work harder to differential their products to gain customers. Customers will ultimately gain better programming, better signal strengths and quality and more choices.

Rooftop antenna should not be part of the signal intensity measurement. Rooftop antenna, like satellite dishes, are an investment the consumer make to receive programming and should be optional equipment. If the signal intensity measurement requires a rooftop antenna, consumers are required to purchase additional equipment without a choice of which equipment (thus signal provider) they want. Consumers who are required to use rooftop antenna are forced by legislation into a given system which limits consumers choices. Rooftop antenna are exactly like satellite dishes (small direct satellite dishes or large cable system dishes) in that they are intended to boost the signal reception.

Thank you for the opportunity to provide you feedback. If you have any questions please call me at (308)-487-3311.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Theron W. Jensen', with a long, sweeping horizontal line extending to the right.

Theron W. Jensen
TWJ/njs



Diode Cable Satellite Systems

609 Commercial Street
Diller, Nebraska 68342



Toll Free -
1-800-203-1524

GENERAL COUNSEL
OF COPYRIGHT

April 24, 1997

APR 28 1997

RECEIVED

Ms. Nanette Petruzzelli, Acting Gen. Counsel
U. S. Copyright GC/1 & R
P. O. Box 70400
Southwest Station
Washington, D. C. 20024

Comment Letter	
RM	97-1
No.	3

Dear Ms. Petruzzelli,

My name is Randy Sandman, General Manager of DIODE CABLE DBS in Diller, Nebraska. We are a DIRECTV service provider and a member of the National Rural Telecommunications Cooperative. We are a subsidiary of Diller Telephone Company- a small, rural telecommunications provider in Southeast Nebraska.

It is the feeling of our Board of Directors that now is the time for change in regards to the "white areas" that restrict us from providing network television service to our customers. Now is the time to allow us to provide the best service possible to our subscribers by allowing them the freedom to choose the programming they want.

The Telecommunications Act of 1996 has made it painfully clear to us as a telephone company that competition is upon all of us in the wide array of telecommunications businesses. If a consumer has the "right" to choose their local telephone provider, why can't they choose the medium to receive network television programming? The days of protectionism are over and competition is here.

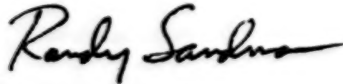
Times and technology have changed. As a telephone provider we have prided ourselves in keeping up with trends in our business and providing exceptional customer service and quality. the local network affiliates can survive if they can adapt to the new competitive climate and make their programming "wanted" as much as our satellite delivered services.

The network programming provided on the Digital Satellite System is superior in picture, quality, and sound. With new digital technology, local affiliates have the same

capabilities to provide this to customers. Will they? We believe they will drag their feet as long as "white areas" and "grade b" signal contours exist.

You have a tremendous task at hand. Please consider lifting the protectionist restrictions on satellite programming. Please allow consumers the freedom to choose their programming source. And finally, please allow us to continue our tradition of providing the best service possible to all of our customer base. Thank you for your attention in this matter.

Sincerely,

A handwritten signature in cursive script that reads "Randy Sandman".

Randy Sandman
General Manager
Diode Cable DBS
Diller, NE

ORIGINAL

**Before the
LIBRARY OF CONGRESS
COPYRIGHT OFFICE
Washington, D.C. 20540**

**GENERAL COUNSEL
OF COPYRIGHT**

APR 28 1997

RECEIVED

In re:

**Revision of the Cable &
Satellite Carrier
Compulsory Licenses**

Docket No. 97-1

COMMENTS OF U S WEST, INC.

Comment Letter

RM 97-1

No. 4

**Robert J. Sachs
The Pilot House
Lewis Wharf
Boston, MA 02110
(617) 742-9500**

**Brenda L. Fox
1020 19th Street, N.W.
Suite 700
Washington, DC 20036
(202) 429-3122**

**Julia K. Kane
7800 East Orchard Road
Suite 490
Englewood, CO 80111
(303) 796-6014**

Its Attorneys

April 28, 1997

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**Before the
LIBRARY OF CONGRESS
COPYRIGHT OFFICE
Washington, D.C. 20540**

In re:)	
)	
Revision of the Cable &)	Docket No. 97-1
Satellite Carrier)	
Compulsory Licenses)	

COMMENTS OF U S WEST

U S WEST, Inc. ("U S WEST") submits these comments concerning the copyright licensing regimes governing the retransmission of over-the-air broadcast signals, as requested by the Copyright Office notice of March 17, 1997.¹ U S WEST owns the third largest cable television distributor in the United States, Continental Cablevision, and serves approximately five million domestic cable customers. U S WEST also holds a substantial partnership interest (25.5%) in Time Warner Entertainment and an array of video program and other production interests. In addition, U S WEST provides local exchange service in a fourteen-state telephone service area.

The Office has solicited comments on a broad array of questions. U S WEST's Comments focus on five areas:

¹ *Revision of the Cable and Satellite Carrier Compulsory Licenses*, Docket No. 97-1, 62 Fed. Reg. 13396 (March 20, 1997). The deadline for filing was extended to April 28 by Order of April 11, 1997, 62 Fed. Reg. 18655 (April 16, 1997).

- I. The compulsory license continues to serve a market clearing function which is essential for cable operators, television broadcasters, and their program suppliers.
- II. There is no justification for additional compensation to the networks or to any of the program suppliers participating in a market which has fully adjusted to the license. The license assures that programming which has already been fully paid for is not paid for again. It permits program suppliers to "superstations" and other retransmitted stations to be fairly compensated for distant signal carriage without sacrificing the market clearing functions of the compulsory license.
- III. The repeal or sunset of the compulsory license would disrupt, rather than facilitate, market transactions.
- IV. To promote competition and regulatory parity, conditions must be placed on DBS retransmission of local signals.
- V. The Section 111 license can be easily improved by eliminating the anomaly known colloquially as "phantom signal" attribution.

I. The Compulsory License Performs Market Clearing Functions Which Are As Essential Today As They Were When First Adopted

The Notice begins with the basic question of the continuing need for compulsory licenses. The Section 111 cable compulsory license is as essential today as it was when adopted 20 years ago. In the early 1970s, when compulsory licensing was first explored, all parties, including program suppliers to the broadcast industry, agreed that it would be impractical to impose full copyright liability and expect every cable system to obtain a private copyright license from each program supplier to each broadcast station carried on cable. MPAA President Jack Valenti explained it this way in testifying to Congress in 1974:

Mr. Badillo. Would it be possible for us merely to say that it is a copyright and then leave the question of the amount to be paid to be settled in the marketplace?

Mr. Valenti. I would have to tell you that I think there would be administrative difficulties in the free play of the marketplace. That is what the compulsory license was created to avoid, such an administrative difficulty; a compulsory license covering all signals, lessening the paperwork, lessening everything.²

As a result, retransmission of broadcast stations was first defined to be a "performance" (triggering copyright liability) only when the "compulsory" license was created to clear those rights, on a blanket basis, with distribution of a royalty pool among all claimants to the underlying TV shows. As the FCC has summarized: "In this compromise--between the two extremes of no copyright protection (as existed prior to 1976) and full copyright protection--Congress struck what it found to be a fair balance between the rights of the copyright owners and copyright users in order to advance the paramount rights of the viewing public."³

² Quoted in *Inquiry into the Economic Relationship Between Television Broad. and Cable Television*, 79 F.C.C.2d 663, 804 (1980).

³ *Id.* at 805.

More than two decades later, the situation remains the same. There is no workable alternative to the compulsory license system.

A. Broadcast stations do not have the rights to clear their broadcast day for cable carriage.

A TV broadcast station buys only limited rights in series, motion pictures, and other programming. Typically, it acquires rights only for a limited number of free broadcasts over the air to its local market. As a result, stations do not have the rights to clear their broadcast day for cable carriage.

It would take thousands of negotiations for cable operators to clear all copyrights in a "private" market. The negotiations would be perpetual because network lineups change regularly and local stations routinely change their broadcast day. The need for advance notice, negotiation, and clearance for a dozen stations in each market would be overwhelming, if not impossible, and would create an impenetrable barrier to carriage of local stations, let alone distant signals.⁴

⁴ On average, Continental Cablevision's cable systems carry about nine local and two to three distant broadcast stations, every one of which broadcasts an ever changing assortment of programming.

B. Broadcasters and broadcast program suppliers have refused to secure the rights to clear cable retransmissions.

Cable networks (like TNT and HBO) with negotiated through-to-viewer programming rights are able to directly license the programming for cable carriage. Broadcasters have refused to change their program acquisition practices to place themselves in position to clear their broadcast day.⁵ Certainly, broadcasters who wish to model themselves on cable networks could also obtain through-to-viewer rights through their program supply contracts. Having failed to do so, broadcasters rely on the compulsory license to clear cable carriage. For example, in almost every retransmission consent agreement which Continental Cablevision reached after 1992, broadcasters specifically declined to clear copyrights, and referred cable operators to the compulsory license for copyright clearance.

Likewise, commercial networks (ABC, CBS and NBC) have the ability to obtain the national rights to cable and satellite retransmission of the broadcast network feed when assembling their lineups. Every commercial network today owns basic cable networks for which they clear rights through to the cable subscriber.⁶ For broadcast feeds, however, the commercial broadcast networks have declined to secure such rights.

⁵ In the early 1990's, one broadcast network urged TV broadcasters to purchase all the rights needed to begin to clear their program day for retransmission in the private cable market. The overture was rebuffed by the program suppliers. Testimony of Preston Padden, Tr. 3768-69 (April 15, 1997), *Adjustment of Rates for the Satellite Carrier Compulsory License*, Docket No. 96-3 CARP SRA, 62 Fed. Reg. 9212 (Feb. 28, 1997).

⁶ For example, MSNBC (NBC), CMT (CBS), and ESPN (ABC).

U S WEST believes that until all broadcasters assemble the rights to clear their broadcast days for cable retransmission, there is no private market alternative to the compulsory license. The broadcasters and program suppliers are as dependent on the compulsory license as are cable operators and satellite TV providers.

II. The Marketplace Has Fully Adjusted to the Compulsory License to Provide All Appropriate Compensation to Networks and Program Suppliers.

While providing essential clearances functions, the compulsory license has not derogated program owners' rights of fair compensation. Whether one analyzes carriage of local signals, network programming, or distant non-network programming, it is clear that the marketplace has fully adjusted to the compulsory license to provide all appropriate compensation.

A. Retransmission of local signals to local audiences does no more than deliver audiences whom the broadcaster intends to reach and for whom the program suppliers have already been paid.

Under Section 111, "local" is generally defined as the Area of Dominant Influence, which is the commercial market to which the station is assigned for advertiser "ratings." Local retransmission serves the interests of local broadcasters who are fundamentally in the business of delivering audiences to advertisers. Advertisers fully compensate broadcasters based on the local market. Carriage of local signals under the cable compulsory license does nothing more than deliver programming to its intended audience.⁷ Hence, under Section 111, carriage of local

⁷ From the outset, both the Supreme Court and Congress recognized that retransmission of local signals to local audiences was not a "performance" for which a royalty should be paid. In *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 399-400 (1968), the Court viewed such carriage as no more than facilitating viewers' reception of signals which had been intentionally broadcast for their viewing. Congress reached the same conclusion. See, H.R. Rep. 94-1476, 94th Cong. 2d Sess. at 90 (1976).

signals does not carry a royalty in recognition that programming has already been purchased for delivery to that local market, and that the program suppliers have been fully compensated for that delivery.⁸

B. Retransmission of network broadcast signals to national audiences does no more than deliver audiences whom the network intends to reach and for whom the program suppliers have already been paid.

Likewise, national carriage of broadcast network programming does nothing more than deliver programming to its intended audience. Commercial broadcast networks (ABC, CBS, NBC⁹) purchase programming for national distribution, with all program suppliers pricing their product accordingly.¹⁰ The networks sell advertising on the premise of national exposure to that programming. The networks *in fact compensate* their terrestrial affiliates (about \$600M/year for 97 million television households, or \$0.50/home/month) to disseminate that national programming with ads intact. In short, compensation for national distribution of programming is fully paid at the point of sale to the networks and to advertisers. To account for this, Section 111 values a distant network affiliate at 0.25 of a non-network station to eliminate compensation for the programming delivered by the network. Compensation is paid only for carriage of non-network programming (e.g., local news) inserted by the local affiliate, when such programming is carried outside of the affiliate's intended local market.

⁸ In the rare instance when a cable system carries *r.o* distant signals, it pays for a minimum of one. However, only 1% of systems fall into this category. Docket No. 96-3 CARP SRA, Tr. 3029 (T. Larson, April 10, 1997).

⁹ FOX is not yet treated as a network under Section 111.

¹⁰ H.R. Rep. 94-1476 at 90.

There is no justification for further compensation to networks. Added compensation would be nothing more than a windfall.¹¹

- C. **Through program supply contracts, "superstation taxes" and similar payments, program suppliers are already paid for carriage of non-network programming to distant markets.**

Carriage of non-network programming into distant markets is carriage to a new audience. That carriage is covered under the compulsory license. In addition, the program supply market has made adjustments for market effects which may not be accounted for in present royalties for carriage of distant non-network programming.

Every program supplier which sells to WTBS knows it is selling to a national audience, and would not rationally price its product based solely on the Atlanta DMA. WTBS sells national spots to finance such national buys, actually replacing national ads for local in the feed uplinked as a superstation. WTBS is also required to make supplemental superstation payments to Major League Baseball.¹² In similar fashion, the NBA knows that WGN has a national audience, and has worked out private payment arrangements, akin to a superstation tax, to allow the Chicago Bulls to be carried on that superstation.¹³ Likewise, the WB network sought

¹¹ Last year, the majority of NBC's profits came from unexpected success on the Summer Olympics. That did not translate into a richer pool from which to buy better programming. GE instead declared a record dividend which its Chairman attributed in part to the Olympics. See, Steve McClellan, *Big Year for Big Four*, *Broadcasting & Cable*, Mar. 3, 1997, at 5. Also see, *General Electric Co.*, Reuters Financial Service, Jan. 16, 1997.

¹² See Steve McClellan, *TBS to go basic, Braves or no*, *Broadcasting & Cable*, April 21, 1997, at 11.

¹³ See *Chicago Prof'l Sports L.P. v National Basketball Ass'n*, 95 F.3d 593 (7th Cir. 1996).

out WGN for affiliation to launch a new network for national distribution of its network feed. The market provides ample opportunities for adjustments around the compulsory license, and those adjustments abound.

From the point of view of local stations, distant signal importation is of little consequence to the audience for local commercials. Supposed audience diversion from watching local stations has been a theoretical concern for decades. Whenever pressed to demonstrate the effects, broadcasters have been unable to present credible evidence. Local stations have recently testified that they do not even bother to counterprogram against such imported signals.¹⁴ If there has been any loss of audience share, it has been to cable networks, whose ratings continue to climb and whose development served as the bedrock upon which the "must carry" rules were successfully defended in the Supreme Court. There is simply no basis for assuming that distant signal importation is of consequence to local broadcasters. Today, heavily penetrated VCRs have probably done more to reduce viewing of commercials than any multi-channel video technology, yet the broadcasters have enjoyed record profits. There is simply no factual basis for an impact tax, as suggested in the Notice.

The market is obviously resilient enough to account for the compulsory license, and it has done so. This is not different in kind from the manner in which the market has adjusted to all other broadcasting regulations, such as limits on territorial exclusivity, limits on group ownership, payment for (or free grants of) digital spectrum, restrictions on network/affiliate

¹⁴ Docket No. 96-3 CARP SRA, Tr. 825-27 (testimony of William Graf, March 18, 1997).

relations, and limits on program exclusivity in cable network program agreements. The compulsory license should not be regarded as a derogation of a free market in TV rights. Rather, the license should be viewed merely as part of the carefully woven fabric under which all parties have learned to operate, and under which all parties benefit.

III. Sunset of the Compulsory License Would for the First Time Impose Copyright Liability with No Available Market Clearing Mechanism.

A. Prior sunset dates have not produced private market clearing mechanisms.

Imposing some sunset review, as suggested in the Notice, is tantamount to repeal. A lesson may be learned from review of the satellite compulsory license, which was adopted in five year increments. When Section 119 was first adopted, it was assumed that within five years the broadcasters would be able to clear the broadcast signals privately at "fair market" rates. However, by 1994 it became evident that the broadcasters were no closer to obtaining the rights to clear the broadcast day than they had been in 1988. The license was extended through 1999, on terms which have created a contentious hearing now underway at the Office,¹⁵ and equally contentious "white area" litigation.¹⁶ Rather than creating private clearance mechanisms as originally assumed, the networks used the sunset review in 1994 to change the rate adjustment standard to the broad standard under which the rates are now being re-arbitrated at considerable

¹⁵ *Adjustment of Rates for the Satellite Carrier Compulsory License*, Dkt. No. 96-3 CARP SRA, 62 Fed. Reg. 9212 (Feb. 28, 1997).

¹⁶ See, e.g., *Cannan Communications v. Primetime 24 Joint Venture*, No. 2096-CV-086 (N.D. Tex. 1996); and, *CBS, Inc. v. Primetime 24 Joint Venture*, No. 96-3650 CIV-Nesbitt (S.D. Fla. 1996).

time and expense. There is no indication that a sunset date for the Section 111 license would be any more successful in creating private market clearing mechanisms.

Imposing sunset review dates defeats the certainty necessary for business planning. Continental Cablevision, like other cable operators, is routinely required to commit to 10-15 year franchise agreements. Continental has also entered into a long-term "social contract" with the FCC requiring \$1.7B of investment in capital and the addition of an average of ten (10) new programming services per system. In an effort to minimize consumer disruption, Continental tries to limit the frequency of rate increases to intervals of a year or longer. Not knowing the terms of the license introduces needless uncertainty into already complex franchise renewal negotiations and rate setting procedures.

B. Full copyright liability has not previously been imposed in the law, and has been used only as an instrument to suppress cable's development.

It must be recalled that compulsory licenses emerged not as a departure from full copyright liability, but as a political accommodation after courts had found broadcast retransmission *not* to be a copyright "performance." In the 1960s, the broadcast networks sought to use copyright litigation as a weapon to constrain the emergence of cable television. In *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), the Supreme Court rejected those efforts, resulting in immediate regulatory response. At the behest of broadcasters, the FCC imposed a nearly devastating programming freeze on the cable industry.¹⁷ The cable

¹⁷ See, 47 C.F.R. § 74.1107(a) (1971) (regulations requiring case-by-case FCC review and approval of every distant signal carried by a cable system).

industry emerged only by conceding to the so-called "Consensus Agreement" adopted by the FCC in 1972.¹⁸ As part of the Consensus Agreement, the cable industry agreed with Hollywood and the broadcasters not simply to treat retransmission as a performance, but to simultaneously create a streamlined clearance and royalty payment mechanism. The satellite industry survived a similar attempt by the broadcast networks to use copyright litigation to halt an emerging industry.¹⁹ Sunsetting the compulsory licenses does not return the parties to status quo ante. Prior to the Copyright Act, cable retransmission was not deemed a performance at all. As a result, sunsetting the licenses without defining retransmission as a non-performance would, for the first time ever, create full copyright liability *without a clearance mechanism*, throwing all parties into the impossible situation which the 1976 Act was designed to avoid.

IV. Compulsory Licenses Should Be Applied to All Competing Multi-channel Video Providers

The Notice asks whether the compulsory licenses for cable and for satellite may be applied to all technologies; whether the licenses should be unified or harmonized; and how local signal retransmission, like that performed by cable, may be accomplished on DBS.

¹⁸ *Cable Television Report & Order*, 36 F.C.C. 2d 143 app. D, at 313-317 (1972). The Consensus Agreement included must carry, territorial exclusivity, distant signal quotas, and the present copyright arrangement.

¹⁹ When a satellite carrier in the 1980s uplinked network affiliates and began to offer them directly to backyard satellite dish owners, the commercial broadcast networks sued for copyright infringement, and won in the district court. That decision was ultimately reversed on appeal, when the 11th Circuit held that the carrier was a cable system with its headend in the sky. *National Broad. Co., Inc. v. Satellite Broad. Networks, Inc.*, 940 F.2d 1467 (11th Cir. 1991). Although the Copyright Office rejected that decision, Congress adopted Section 119 to provide some measure of certainty for the nascent Direct to Home (DTH) industry. *Satellite Home Viewer Act of 1994*, Pub. L. No. 103-369, 108 Stat. 3477 (codified at 17 U.S.C. § 119 (1994)).

A. Section 111 applies to all terrestrial MVPDs

All terrestrial multi-channel video providers ("MVPDs") should be eligible for the Section 111 cable license. Section 111 is designed to be expansive in its definition of "cable." As the Office determined April 17, 1997, the license covers so-called SMATVs, despite the fact that the FCC specifically excludes these facilities from the definition of cable. In 1994, the license was amended to explicitly cover MMDS ("wireless cable"). Today, the license should be construed to cover all terrestrial technologies which might be classified as cable. Cable, SMATV, MMDS, LMDS, telephone overbuilds, and Open Video Systems ("OVS") are fundamentally competing technologies which should have comparable rights and responsibilities.

B. The per-subscriber fee of Section 119 should apply to MVPDs with uniform, national packages

There is one particular distinguishing feature of satellite which makes it more appropriate to use Section 119. Cable (and other terrestrial MVPD) signal carriage complements vary by locality. The carriage depends on local ADIs, signal carriage history (either of each operator or of competing grandfathered systems), local quotas which vary by market size, and other local variables. These are susceptible to local calculations of the specific complements offered. By contrast, satellite operators have standard packages for a national audience. This difference leads to national average royalty schedules such as those originally adopted in Section 119 in 1988.

The Notice asks whether the per-subscriber fee of the Section 119 satellite license should serve as a model for Section 111 reform. As demonstrated by the contentious hearings

before the Office, the arbitration standards under which the Section 119 license is now being adjusted are fundamentally vague and unworkable. Under no circumstances should the Section 111 cable royalty be modified to introduce the artificially high royalties of Section 119, or the vague arbitration standards which spawned them.

The market has already adjusted to current Section 111 rates, with Major League Baseball "superstation taxes," NBA equivalents, syndication contracts negotiated with superstations with full accounting for their national audiences, advertising rates which internalize cable retransmission, substitution of national spots for local on uplinked stations, and retransmission consent contracts in which broadcasters explicitly rely on the cable compulsory license to clear copyrights. To increase Section 111 rates now would do no more than bestow a windfall on parties who have already arranged for fair compensation through and around present compulsory license rates.

C. DBS Carriers should be permitted to opt into full cable status, with all of its rights and obligations.

In view of the vigorous competition between DBS and other multichannel providers, the most desirable solution would be to reduce the regulatory burdens on all. But so long as one provider is required to operate under substantial regulatory constraints and obligations, then for purposes of parity and fair competition, those rules should be applied to all. Accordingly, direct-to-home (DTH) carriers should have the right to carry local broadcast signals, but only if the carriers are subject to the obligations imposed on cable operators. These include

the fundamentals of the 1972 Consensus Agreement, and new public interest obligations imposed in 1992 on vertically integrated cable operators. If a DTH carrier is to operate as a cable system, it must abide by these same requirements. At a minimum, this would include (1) must carry, (2) distant signal quotas, (3) exclusivity, and (4) program access.

- (1) **Must carry.** Any cable system which carries local broadcast signals must carry them all. Cable operators are required to carry all commercial broadcasters licensed to each ADI, up to 1/3 of channel capacity. They must also carry all nearby public broadcasting stations. Cable operators are required to import a distant PBS if one is not available locally. Each broadcaster is given several options of channel position, which must be exercised in order to maintain their off-air channel position or to be placed in the lowest numbered channels, where remote controls begin their surfing. No cable operator may provide any video programming without first selling all of the must carry signals to customers. In addition, those must carries must be delivered unscrambled to promote compatibility with customers' television receivers.

Any DTH carrier wishing to carry local signals must step up to these same obligations. The notion that a DBS carrier could carry only selected local signals is contrary to the express purpose of must carry to prevent discriminatory exclusion of any local broadcaster. Continental Cablevision provides service to more than 1,000 communities, and provides each with all of the required must carry broadcast signals within 1/3 of its channel capacity. If DBS carriers face capacity limits which constrain such carriage, then

they should provide local signals via satellite only to those markets in which they can carry all must carry signals. Where they cannot accommodate all must carry signals in a market, they can utilize integrated broadcast antennas, as Rupert Murdoch recently proposed to the Senate Commerce Committee. Alternatively, the must carry rules could be amended for all MVPDs, to extend carriage requirements only to broadcasters who are significantly viewed within a market (as was the case under the FCC's 1987 must carry rules). Permitting DBS carriers to cherry pick local stations or to deny them their preferred channel assignments will defeat the very interests identified as constitutionally compelling by the Supreme Court in *Turner*, and would distort competition among multichannel providers.²⁰

- (2) **Distant signal quotas.** Cable systems may import only a limited number of signals into local markets (depending on market size, proximity of TV stations, and history of signal carriage on the cable system). When the FCC deregulated these distant signal quotas in 1981, the copyright rules were immediately adjusted by the Copyright Royalty Tribunal

²⁰ *Turner Broad. Sys., Inc. v. FCC*, 1997 U.S. LEXIS 2078, 65 U.S.L.W. 4209 (U.S. Mar. 31, 1997).

to reimpose the quotas.²¹ DTH carriers should be subject to equivalent quotas limiting the number of imported distant independent stations.

- (3) **Exclusivity.** Through syndicated exclusivity, broadcasters with exclusive exhibition rights to movies and series in their markets have the right to require "black outs" of those same programs from imported signals carried on cable systems. Parallel "network nonduplication" rules require blackouts of imported network programming when it is available from a local broadcast affiliate. "Sports blackout" rules provide similar protection for the live game receipts of local teams by requiring black out of home games from local and distant broadcasts. Every satellite signal comes with a data stream in which individual receivers are addressed. We suggest that these data streams be addressed by zip code so that the syndex obligation imposed on cable will also be honored by DTH carriers. The same addressability might be employed to comply with sports blackout. "White area" limitations applied to DTH are the counterpart of network nonduplication. They are designed to give primacy to the local network affiliate if it is available over the air. The mechanics of these restrictions might well be improved, but they must remain in place for DTH.

²¹ The standard royalty for distant signals is a graduated scale of royalties which changes with the number of distant signals carried. The first "distant signal equivalent" (independent station) is valued at a royalty of about 0.9% of basic service receipts. (Basic service is the level of service on which all broadcast signals may be received.) The second, third, and fourth "DSEs" are valued at a royalty of about 0.6%. The remaining DSEs are valued at about 0.3%. The CRT was an agency created by the 1976 Act to adjust rates under certain circumstances, such as when communications law changed. In 1982, the CRT imposed a dramatically higher royalty on any signal which would not have been allowed under the old FCC quotas. The rate, 3.75% of gross receipts, has served to re-impose the old signal quotas and reassert the primacy of the Consensus Agreement. Fewer than 15% of subscribers receive any 3.75 signal today and the number of 3.75 signals continues to decline each year. The CRT has since been abolished and its duties have devolved to the Copyright Office.

- (4) **Program Access.** The 1992 Cable Act imposed additional obligations on vertically integrated programmers and distributors. Under these "program access" rules, programming which is affiliated with cable operators must be made available to cable's competitors. There are also severe constraints on exclusive programming contracts. If DBS is to operate as a cable system, then programming which is affiliated with DBS carriers must be made available to other MVPDs under comparable program access rules. There should also be the same constraints on exclusive satellite programming contracts as there are on cable programming contracts.

V. **The Section 111 License Can Be Easily Improved by Remediating the "Phantom Signal" Problem.**

The Notice seeks comment on possible methods to streamline the Section 111 license. Continental Cablevision has fully adjusted to the current licensing arrangements and fears that the "streamlining" cure may be more troublesome and disruptive than the complexities which we have already internalized and handle routinely. There is, however, one anomaly which can readily be corrected. This is colloquially known as the "phantom signal" problem.

Under Section 111, larger systems pay royalties which vary with revenues and signals carried, using the "long form" Statement of Account SA3. Under Section 111, smaller cable systems (those which earn less than \$292,000 in basic revenues over 6 months) pay lower, less complex royalties.²² In order to prevent large systems from artificially carving themselves

²² See, 37 C.F.R. § 201.17(d)(2)(i) (1996).

up into smaller systems to qualify for this rate, the Act defines as a single "cable system" those communities which are served from a single headend.²³ That is quite understandable and conforms with technology and communications law. But the Copyright Act also defines as a single system those cable communities which are under common ownership and are contiguous with one another, even if they are not integrated facilities.²⁴

In and of itself, this is not a problem, if it is used to distinguish large SA3 systems from small. But it becomes a problem if one aggregates the *signals* carried on separate systems, rather than merely aggregating revenues to determine whether one should file on the SA3 "long form." For example, cable MSOs often swap systems in order to assemble regional clusters within a particular market. Over the past decade, for instance, Continental has acquired other cable systems in New England in order to form clusters in the region. Continental has also swapped systems with other MSOs so that it can "cluster" in New England and other MSOs can concentrate on their particular regions. As a result, Continental today owns cable systems from Maine to Connecticut, served by dozens of separate headends. Some might label these communities "contiguous" if they were willing to overlook rivers, terrain, and other barriers which led to their development as separate systems in the first place. Each system carries a different variety of signals. Systems in Massachusetts carry signals in the Boston or Springfield ADI, while systems in Connecticut look to the Hartford ADI.

²³ 17 U.S.C. § 111(f) (1996). See *Compulsory License for Cable Systems*, Docket 77-2, 43 Fed. Reg. 953 (Jan. 5, 1978); 42 Fed. Reg. 61051 (Dec. 1, 1977).

²⁴ *Id.*

Under some interpretations, when systems are acquired in regional clusters, any signal delivered to any customer in any part of a "contiguous" system is deemed to be carried to every customer in every other contiguous system. In some acquisitions, this expansive interpretation of "contiguous" has had dramatic consequences. It meant that when System A, which carried WTBS and WGN, came under common ownership with System B, which carried WTBS and WWOR, both systems would be deemed to carry three distant independent stations, even when each carried only two. If these "phantom" signals are attributed to systems that do not and cannot receive such signals, royalties are inflated beyond the intended levels.

A corollary of this phantom signal attribution policy is a mechanical quirk on the Statement of Account forms. Under Continental Cablevision's "Social Contract" with the FCC, it offers a "Basic Service Tier" (BST) and a separate, optional "Migrated Product Tier" (MPT) which sometimes includes superstations. By the math of the Form SA3, every BST customer is deemed to pay for any broadcast signal in the MPT, whether or not they buy the MPT. For example, if 9500 customers pay \$10 to receive the BST, and 500 customers pay that plus \$2 more to receive an MPT package of three distant signals, then 10,000 customers are taxed as though they are all paying \$100,000 plus \$1,000 more for receipt of all signals.

The Office solicited comments to resolve this problem in RM 89-2, but has not resolved the matter.²⁵ The solution is straightforward and well within reach. The SA3 forms

²⁵ See, *Compulsory License for and Merger of Cable Systems; Notice of Inquiry*, RM 89-2, 54 Fed. Reg. 38390, 38391 (Sep. 18, 1989).

already permit use of "subscriber groups" to reflect differing signal complements. The Office should explicitly change the instructions to utilize such groups to eliminate phantom signal attribution. For administrative convenience, the Office could also permit filings to be made on separate Statements of Account, so long as "contiguous" systems which in aggregate earn Form SA3 revenues continue to pay at Form SA3 rates.

Respectfully submitted,

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OF COPYRIGHT

APR 22 1997

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Comments of West Florida Electric Cooperative Assoc., Inc.
Before the Copyright Office
Washington, D.C.

in the Matter of Revision of the Satellite Carrier Compulsory Licenses
Docket 97-1
April 1997

Comment Letter

RM 97-1

No. 5

My name is Gary F. Clark and I am the Manager of Marketing and Economic Development for West Florida Electric Cooperative (WFEC). My company is a rural electric cooperative located in the central panhandle of Florida serving about 22,000 electric consumers. Our primary service area consists of Jackson, Holmes, Washington and Calhoun counties. These counties are primarily an agricultural area. The total population of these four counties is less than 100,000 rural residents.

West Florida Electric was founded in 1937 to provide electric service to rural residents in these counties. Since that time, we have not lost sight of our original goal of providing needed and valuable services to these same people. In 1987 WFEC joined the National Rural Telecommunications Cooperative (NRTC) with the goal of providing quality and affordable television entertainment to our members. NRTC has provided us with the service and support to make this possible. Our primary relationship with NRTC has been as a C-Band programming provider since its inception. From this perspective, we are currently the 12th largest C-Band member in the NRTC system with more than 1,100 subscribers.

In 1995 WFEC signed an exclusive agreement to market DSS to our members as a programming agent. Since that time, DIRECTV took over all agreements and we have become an exclusive agent for DIRECTV. While we do not own territory, WFEC has aggressively marketed DIRECTV even in competition with our own C-Band programming. In early 1996 we developed and implemented an equipment lease program primarily to put our rural consumers in touch with the rest of the world. WFEC currently leases over 500 DSS systems and has sold an additional 500 systems.

Every two years WFEC conducts a survey of its membership. Our surveys indicate that more than 90% of our members do not have access to cable television. Furthermore, only about 12% own a C-Band satellite. We expect to find in this year's survey that a substantial number of our members have purchased a DSS in the last two years. This makes the subject of Compulsory Licenses a major concern for my company. There are currently four network providers serving our general area: WJHG (NBC), WMBB (ABC), WPGX (Fox) - Panama City, Florida and WTVY (CBS) - Dothan, Alabama. None of these stations are located in our service area.

My company has taken a reluctant supportive role in the white area process since the Satellite Home Viewers Act (SHVA) was passed. While we have never agreed with the policy, and have honestly felt that it was not in the best interest of open competition, we have enforced

the rules as fairly and equitably as possible. Probably the most difficult part of enforcement, on my part, has been the difficulty in training my own customer service representatives that this was a necessary and important process that must be followed. It is very hard to teach a person that they can't sell something that they offer for sale.

The white area restrictions have impacted our business in several ways. The most significant impact comes primarily from irate customers who do not understand why they cannot purchase something that their next door neighbor can. For example, customer A and customer B are next door neighbors and both individuals own a satellite receiving system. Customer A ordered his programming through a national programming warehouse who did not properly qualify the potential subscriber. Customer A now receives all networks via satellite. Customer B purchases his programming through the local cooperative, which incidentally does a good job of qualifying network subscribers. Customer B is denied service. When these two gentlemen meet and discuss this item, the local provider becomes the villain and subsequently loses the account. To make this matter even worse, many times customers have learned how the system works and pre-qualify themselves to receive the networks. When this happens and the signal is challenged, we are forced to turn their network programming off. Many times we forfeit the entire account and do not even receive payment for services already provided.

The most absurd portion of the rule pertains to the "90 day waiting period" that applies to former cable subscribers. On several occasions this has prevented us from selling a new system. If a person moves from the city to the country where cable is not available and the quality of an over the air network signal is much less desirable, why should they be penalized for choosing to live in a rural area? This rule does not apply to cable subscribers who move to another cable system or for that matter cable subscribers who do not move but have the option of choosing another cable provider. Rural Americans do not have these luxuries of choice. Many times their only choice for information and entertainment is to invest in satellite hardware.

The consumer's reaction to the qualification process is probably the area of greatest concern. I have personally been cursed and sworn at for refusing to connect a customer with a network station. While this is not entirely uncommon in the electric utility industry, it does not generate the type of image we wish to portray. It does not matter how eloquently you explain the process or the reason for which you cannot qualify the subscriber, the customer firmly believes, as do I, that they have the right to purchase that programming. Customers that I have talked with about the process feel that it is very unfair and that it gives preferential treatment to individuals who have cable or who live in a metropolitan area.

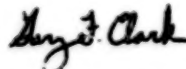
What the local network providers do not realize is that the terrain and atmospheric conditions change so frequently that a constant high quality signal does not exist. Some of our service area falls within the grade-b contour. Most of it, however, is in the white area. I can show you two homes that are located within a mile of each other that will have two completely different picture qualities. To go one step further, before I subscribed to cable, I had two televisions in my home that were connected to the same antenna. On the older television in the living room I could receive a fair picture on three of the network stations. On the television in the bedroom, we could only get one of the networks to come in. I went as far as to swap the cables on the two televisions but still could not improve the picture quality. Oddly enough, with the use of a coathanger in place of the antenna, the television in the bedroom could pick up a distant

network station that could not be intercepted by either television any other way. Under no circumstances could a field test of any sort define quality reception and my personal ability to receive network programming at this location. The current system is not in the best interest of the consumer. If a network challenges my right to purchase programming from another source, it should be their sole responsibility to prove that they are providing me with a high quality signal at all times.

The current white area rules are a hindrance to rural America. These individuals did not ask to be left out of the cable service area. They have once again been passed over because they live in a remote area. To compensate for this disadvantage, many of these individuals spent thousands of dollars to purchase a satellite dish so that they too could enjoy the advantages of information and entertainment. Many others who previously could not afford the investment for a satellite system have been redeemed with the onset of a more affordable DSS system. Now that these individuals have the means, many of them are being refused the service. The local providers are quick to offer the solutions of bigger roof top antenna's and taller poles to mount them on, but no one is offering to help these individuals pay for this or in the case of our many elderly residents, to help them set it up. Rural residents are running scared when you mention to them that their right to purchase a distant network has been challenged and that if they want to fight it and they lose it could cost them a couple hundred dollars. This is not a fair system.

In conclusion, I urge the staff to consider eliminating the white area rules and to develop a more consistent standard by which other services are gauged. Do not put the burden on innocent people who only want convenience and quality in their lives. I urge the staff to consider that congress has repeatedly called for competition in the video services industry. The local networks are already at an advantage. Their service, if received over a conventional roof top antenna is FREE. Individuals who want a distant network are paying for that service. Who has the advantage?

Sincerely,



Gary F. Clark
Manager of Marketing
and Economic Development

/spj

GENERAL COUNSEL
OF COPYRIGHT

APR 23 1997

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April 25, 1997

APR 23 1997

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Continued Letter

RM 97-1

No. 6

Benjamin L. Zelenko, Esq.
Baach Robinson & Lewis
One Thomas Circle, N.W.
Suite 200
Washington, DC 20005-5803

Re: Revision of the Cable and Satellite Carrier
Compulsory Licenses; Public Meetings

Dear Ben:

As we discussed, enclosed is an original and sixteen (16) copies of the Testimony of Ross J. Charap on behalf of ASCAP and before the Copyright Office in hearings to be held from May 6-9, 1997. The testimony must be delivered to the Copyright Office on Monday, April 28, 1997 at:

Office of the General Counsel
Copyright Office
James Madison Memorial Building
Room LM-403
First and Independence Avenue, S.E.
Washington, D.C. 20540

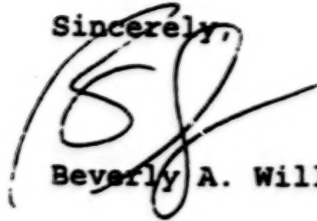
The additional copy is to be file-stamped by the Office and returned to me.

Benjamin L. Zelenko, Esq.
April 25, 1997

Page 2

Many thanks.

Sincerely,

A handwritten signature in black ink, appearing to be 'B. Willett', written over the word 'Sincerely,'.

Beverly A. Willett

BAW:m
Encls.

cc: Ross Charap, Esq.
I. Fred Koenigsberg, Esq.

APR 28 1997

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:
In the Matter of :
:
REVISION OF THE CABLE AND :
SATELLITE COMPULSORY LICENSES :
PUBLIC MEETINGS :
-----X

Docket No. 97-1

Comment Letter

RM 97-1

No. 6

TESTIMONY OF ROSS J. CHARAP ON
BEHALF OF THE AMERICAN SOCIETY OF
COMPOSERS, AUTHORS AND PUBLISHERS
BEFORE THE UNITED STATES COPYRIGHT OFFICE
MAY 6-9, 1997

Register Peters and members of the Copyright Office (the "Office") staff, my name is Ross Charap and I am Director of Legal Affairs, with responsibility for cable matters, of the American Society of Composers, Authors and Publishers ("ASCAP"). I welcome the opportunity to appear before you on behalf of ASCAP and to testify in response to the Office's Notice of Public Meetings and Request for Comments, 62 Fed. Reg. 13396 (March 17, 1997). In accordance with that Notice, as amended, 62 Fed. Reg. 18655 (April 11, 1997), ASCAP reserves the right to submit written reply comments, including proposed legislative amendments, on or before June 16, 1997.

The Office seeks comments and is conducting public meetings on the copyright licensing of retransmissions of over-the-air broadcast signals -- in particular, the cable and satellite carrier compulsory licenses. ASCAP strongly believes

that the cable and satellite carrier compulsory licenses should be repealed and that copyright owners and users should be permitted to negotiate freely in the marketplace.

ASCAP has always favored free marketplace negotiations and saw no need for the establishment of these compulsory licenses. Whatever the facts as they existed when the cable and satellite carrier compulsory licenses were enacted, it is clear that circumstances have changed dramatically. Today, cable systems and satellite carriers wield tremendous market power. Continued government protection simply is unnecessary. We urge the Office to recommend to the Senate Judiciary Committee that the cable and satellite carrier compulsory licenses be eliminated.

I. ASCAP AND ITS INTEREST IN THESE HEARINGS.

ASCAP, the oldest and largest musical performing rights society in the United States, is an unincorporated membership association with more than 79,000 members who are composers, lyricists and publishers of copyrighted musical compositions. These works represent all musical genres -- rock, pop, country, rap and jazz, symphonic and concert, and standards -- all of which form the backbone of our nation's rich musical heritage.

Although the Office has confined its inquiry to the cable and satellite carrier compulsory licenses, we note for the record that ASCAP also believes that the vestiges of the jukebox compulsory license in Section 116, and the noncommercial broadcasting compulsory license in Section 118, are also unnecessary.

On behalf of our members, and members of over 50 affiliated foreign performing rights societies, we license, on a non-exclusive basis, the non-dramatic public performances of the millions of copyrighted musical compositions in our repertory and in the repertories of our affiliated foreign performing rights societies. We collect license fees from music users and distribute all revenue to members after deducting only modest operating costs.

Our licensees include all who perform copyrighted music publicly, such as commercial and noncommercial television and radio stations and networks, cable program services, cable system operators, satellite carriers, concert halls, sports arenas and teams, theme and amusement parks, hotels, background and foreground music services, and airlines.

Throughout our 83-year history, ASCAP and our members have welcomed technological innovation and the increased opportunities for licensing such innovations bring. We are happy that those who operate new media use our members' intellectual property in their businesses -- provided that, as the Copyright Law requires, they pay a reasonable price for the use of that property.

Unfortunately, to date, compensation for retransmission of over-the-air broadcast signals by cable systems and satellite carriers has been determined by the compulsory licensing provisions of the Copyright Law, provisions which we believe have

never reflected the fair market value of our members', or others', copyrighted works.

One last preliminary point: ASCAP has participated in every cable and satellite carrier distribution proceeding and rate adjustment proceeding under Sections 111 and 119. In addition, ASCAP has received royalties from every cable and satellite carrier royalty fund distributed, in whole or in part, to date. In the absence of compulsory licensing, we would be authorized by our members to negotiate the rates paid by users for their use of ASCAP music contained in their retransmissions of over-the-air broadcast signals.

Thus, the tens of thousands of writers and publishers ASCAP represents have a direct and critical interest in the outcome of these hearings and the recommendation to be made by the Office to the Senate Judiciary Committee.

* * *

The Office's Notice raises a number of questions regarding the cable and satellite carrier compulsory licenses. In my testimony, I shall deal only with what ASCAP believes are the most critical issues facing the Office at this time.

II. THE CABLE AND SATELLITE CARRIER COMPULSORY LICENSES
SHOULD BE ELIMINATED AND FREE MARKETPLACE NEGOTIATIONS
SHOULD BE PERMITTED TO DEVELOP.

Cable systems and satellite carriers should be required to negotiate with copyright owners for the use of their property in the free marketplace just as broadcasters and other bulk users of music and copyrighted programming do. Whatever reasons may

have existed for passage of Sections 111 and 119 of the Copyright Law, these mammoth and economically mature industries no longer need, if they ever did, a helping hand from Congress.

A. The 1996 Copyright Act and the
Cable Compulsory License.

At its heart, Section 111 -- the cable compulsory license -- is antithetical to basic principles of Copyright Law. Essentially, the cable compulsory license allows cable operators to retransmit over-the-air broadcast signals containing copyrighted works without a negotiated agreement with the copyright owners of those works. Instead of marketplace negotiations, Section 111 imposes an elaborate and complicated scheme of compulsory licensing.

By way of background, cable television systems were first introduced in the United States in the 1950s and initially provided over-the-air television signals to consumers in areas where signal reception was poor or non-existent due to topographical conditions or distance from television stations. Early cable television systems were basically giant antennas -- retransmitters of over-the-air signals to a limited number of rural communities. In that period, there were no nonbroadcast program services created especially for cable subscribers.

Cable television grew slowly for several decades, held back in part by restrictive Federal Communications Commission ("FCC") regulations. And, at the time of passage of the 1976 Copyright Act, the cable business remained small relative to its current major position in the video marketplace.

Prior to passage of the 1976 Copyright Act, cable television systems transmitted copyrighted music and programming for free. From 1950 through 1977, the systems paid no copyright royalties for their secondary retransmissions of over-the-air broadcast signals because the Supreme Court had ruled that, under the 1909 Copyright Act, cable television retransmissions of over-the-air broadcast signals did not constitute "performances", subject to copyright liability. See Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968) and Teleprompter Corp. v. CBS, Inc., 415 U.S. 394 (1974). Indeed, the Court in Teleprompter placed the responsibility for redressing this obvious inequity squarely on Congress' shoulders:

"These shifts in current business and commercial relationships, while of significance with respect to the organization and growth of the communications industry, simply cannot be controlled by means of litigation based on copyright legislation enacted more than half a century ago, when neither broadcast television nor CATV was yet conceived. Detailed regulation of these relationships, and any ultimate resolution of the many sensitive and important problems in this field, must be left to Congress."

Id. at 414.

In response, Congress adopted a broad definition of "public performance" in the 1976 Copyright Act: all transmissions by cable systems and program services, including retransmissions of broadcast signals, constituted "performances" subject to copyright liability. ASCAP, program producers, broadcasters and other performing rights organizations opposed inclusion of compulsory licensing and a royalty regime in the new law. But, despite limited economic data on the cable industry,

Congress nevertheless enacted a compulsory license for retransmissions of broadcast signals with specific royalty formulas, as part of a global compromise.²

In establishing Section 111, Congress noted that it feared that otherwise "it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system." And, in setting the rates, Congress set the payments at a "modest" level so as not to "retard the orderly development of the cable television industry or the service it provides to its subscribers."³ But today, this industry, which has enjoyed the benefits of compulsory licensing for nearly two decades, bears no resemblance to the fledgling business Congress sought to protect in 1976.⁴

With the development of satellite delivery of cable-only program services in the mid-1970s and the deregulation of the industry in the 1980s, cable grew exponentially -- catching

²S. Rep. No. 94-473 at 80 (1976), reprinted in 5 David Nimmer & Melville B. Nimmer, Nimmer on Copyrights, App. 4A at 4A-137 (1996).

³H.R. Rep. No. 94-1476, at 91 (1976) reprinted in 1976 U.S.C.C.A.N. 5659, 5705.

⁴At the time of passage of the 1976 Copyright Act, there were about 3,450 cable systems serving about 10.8 million subscribers. Total subscriber revenues in 1975 were approximately \$770 million. H.R. Rep. No. 94-1476 at 88 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5702. By contrast, in 1975 total broadcast network advertising revenue was \$2,430,820,400 and total broadcast spot advertising revenue was \$2,290,082,600. Leading National Advertisers, LNA Multi-Media Report Service: Ad \$ Summary 1975, at 1.

and outstripping conventional over-the-air broadcasting in revenue and cutting deeply into audience share.⁵

Cable now provides a vast array of nonbroadcast program services to supplement the fare of its retransmissions of broadcast television. In 1995, there were 137 national and regional cable program services.⁶ Many more are proposed, with launches held back only by technological constraints or channel capacity. In 1993, these program services spent \$3 billion for programming -- a twelve-fold increase over a decade⁸ and as much for programming as paid by the major television networks.⁹ Pay-

See, e.g., FCC, Third Annual Report in the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming ("FCC Third Annual Report"), — F.C.C.R. —, 1997 WL 2451, at ¶ 18 (released Jan. 2, 1997) (reporting that cable systems' market share nearly tripled from 1985 to 1995, while broadcasters lost over 17 percent of their audience and that trend was continuing); Cable Television Consumer Protection and Competition Act of 1992 § 2(a)(13), Pub. L. No. 102-385, 106 Stat. 1460 (finding a "marked shift in market share from broadcast television to cable television services"); Media Ownership: Diversity and Concentration, Hearings Before the Subcomm. on Communications of the Senate Committee on Commerce, Science, and Transportation, 101st Cong., 1st Sess., 427 (1989) (statement of Robert C. Wright, Pres. and CEO of NBC, Inc.) (testifying that cable industry revenues had exceeded broadcast revenues by 1986 and that, by 1988, at least six multiple-system operators ("MSOs") had higher revenues than major broadcast networks).

National Cable Television Ass'n, National Cable Video Networks By Type of Service: 1976-1995, Cable Television Developments, Spring 1996, at 6.

FCC, Third Annual Report, 1997 WL 2451, at ¶ 148.

FCC, Second Report and Order, In the Matter of Evaluation of the Syndication and Financial Interest ("fin-syn") Rule ("Second Report and Order"), 8 F.C.C.R. 3282, 3306 (1993).

See Comments of National Broadcasting Co., Inc. in FCC's 1993 fin-syn proceedings, Feb. 1, 1993, at 13-14.

per-view services, too, are proliferating -- revenues are approaching a billion dollars¹⁰ -- and plans grow apace for interactive channels that will offer movies and other programs "on demand".¹¹

In 1993, the FCC predicted that the growth of new programming choices "will be magnified as . . . 500-channel cable systems are created."¹² Cable giant Telecommunications, Inc. ("TCI") has already introduced experimental 180 channel systems in Connecticut, Illinois and California through the use of digital set top converters.¹³ With further enhancements of digital compression technology, many more cable systems with hundreds of channels will be operational in the near term.¹⁴

¹⁰According to industry experts, pay-per-view revenues for 1996 were \$661 million, with future projections as follows: 1997 -- \$837 million; 1998 -- \$1.064 billion; and 1999 -- \$1.343 billion. Paul Kagan Associates, Inc., The Pay TV Newsletter (forthcoming April 1997).

¹¹Raymond Snoddy, Digital Service Offers Everything. Plus Pizza, The Financial Post, Feb. 7, 1997 at 50 (reporting experimental video on demand ("VOD") service offered by Time Warner in Orlando, Florida); Briefs: VOD In Canada, TR International, Mar. 28, 1997; Alison Mayes, Calgarians May be First to Get Movies on Demand, Calgary Herald, Mar. 18, 1997, at D1.

¹²FCC, Second Report and Order, 8 F.C.C.R. at 3282, ¶ 48.

¹³David and Goliath? SNET Rolls Out Cable Service in TCI's Shadow, Telephony, Mar. 17, 1997; TCI's Digital Express: Confirmed Debut of its Digital Video Service ALL TV in Fremont, CA and Arlington Heights, IL, Cable World, Feb. 10, 1997, at 1; TCI Rolls Out Digitally in IL, CA, Media Daily, Feb. 10, 1997.

¹⁴See also Testimony of Preston Padden on behalf of American Sky Broadcasting ("AskyB"), In the Matter of 1996 Satellite Carrier Royalty Rate Adjustment Proceedings ("Padden Testimony"), Docket No. 96-3 CARP-SRA, Apr. 15, 1997, Tr. pp. 3753-56 (AskyB hopes to have a total satellite channel capacity of at least

According to Congress, cable is now "the dominant video distribution medium".¹⁵ By the end of 1995, cable was available to 96.7% of U.S. television households with 67% of these households subscribing to cable.¹⁶ Between 1980 and 1993, the number of cable households grew from 15 million to almost 60 million¹⁷; now the number is more than 64 million subscribers.¹⁸ According to industry experts, cable subscription is expected to continue to grow.¹⁹

In the same period from 1980 to 1993, industry revenues climbed from \$1.4 billion to approximately \$24 billion.²⁰ By 1996, that number had climbed even further to a total of \$34

between 800-900 channels).

¹⁵Cable Television Consumer Protection and Competition Act of 1992 § 2(a)(3), Pub. L. No. 102-385, 106 Stat. 1460.

¹⁶FCC, Third Annual Report, 1997 WL 2451, at ¶¶ 13-14 & App. B, Table 1.

¹⁷Broadcasting Publications, Inc., Broadcasting and Cable Yearbook, 1980, and R.R. Bowker, Broadcasting and Cable Yearbook, 1993, Vol. 1, p. xxi.

¹⁸1997 TV & Cable Factbook; The Kagan Media Index, Feb. 28, 1997; Warren Publishing, Inc., Cable and Television Fact Book No. 65 I-80 (1997).

¹⁹Projections published in 1996 indicated future cable growth as follows: 1998 -- 64.9 million subscribers and 1999 -- 64.6 million subscribers. Paul Kagan Associates, Ltd., Cable TV Financial Databook 11 (1996). However, current unpublished projections from industry expert Paul Kagan Associates predict modest cable growth for the next few years as follows: 1998 -- 65.1 million subscribers, 1999 -- 65.6 million subscribers, and 2000 -- 65.9 million subscribers.

²⁰Broadcasting Publications, Inc., Broadcasting and Cable Yearbook, 1980, and R.R. Bowker, Broadcasting and Cable Yearbook, 1993, Vol. 1, p. xxi.

billion²¹, surpassing the broadcast industry which had revenues of \$33.48 billion in the same year.²²

Continued dramatic growth for cable is predicted. A leading industry expert, for example, has forecast that pay-per-view services alone will generate approximately \$8 billion in additional annual revenues by the end of the decade.²³

There are now nearly 11,000 local cable systems.²⁴ This is not a "mom and pop" business: after years of relentless consolidation, four giant MSOs control cable systems serving 61.4% of the cable subscriber universe; and the top ten MSOs control more than 80%. One company, TCI, along with its affiliates, controls approximately 28% of all cable subscribers.²⁵

²¹The February 27, 1997 issue of the The Kagan Media Index estimated total cable operator revenues for 1996 at \$27.784 billion and total cable advertising revenues at \$6.775 billion, for total cable revenues of \$34.559 billion.

²²See Competitive Media Reporting, Inc./Magazine Publishers of America, Inc., Ad \$ Summary, 1996 (in 1996 total network advertising revenue was \$14,739,557,400, total spot advertising revenue was \$14,017,723,700 and total syndicated television advertising revenue was \$4,728,350,000).

²³Paul Kagan Associates, Inc., The Pay TV Newsletter, Feb. 28, 1994 at 3. See footnote 10, supra, for a discussion of projected future growth.

²⁴Warren Publishing, Inc., Cable and Television Fact Book No. 65 I-81-I-82 (1997) (reporting 10,943 cable systems in the United States as of Oct. 1, 1996).

²⁵FCC, Third Annual Report, 1997 WL 2451, at ¶ 130 & App. F, Table 2 (reporting that, as of 1996, the four largest MSOs had 61.40 percent of all cable subscribers and that the ten largest MSOs had 80.24 percent). It is also worth noting that the smaller, independent systems that serve the rest of cable subscribers often have limited channel capacity and, as a result,

Cable operators also enjoy a monopoly in their marketplace. All but a few communities are served by only one cable operator. Nor have the cable industry's erstwhile competitors, Direct Broadcast Satellite ("DBS"), Multichannel Multipoint Distribution System ("MMDS") and the telephone companies' Open Video Systems ("OVS"), posed a palpable threat to cable's video provider hegemony. As of September 1996, the non-cable subscriber universe amounted only to about 8.1 million homes.²⁶

There is also a very significant degree of vertical integration in the cable industry. For example, TCI or its affiliates also control or have financial interests in 34 national or regional cable programming services.²⁷ MSOs, in general, control or have financial interests in about half of the most popular basic program services, each reaching at least 60 million homes,²⁸ and also control many of the popular premium and pay-per-view services.²⁹

likely do not import distant signals frequently.

²⁶FCC, Third Annual Report, 1997 WL 2451, at App. F.

²⁷FCC, Third Annual Report, 1997 WL 2451, at ¶ 145 & App. G, Table 5.

²⁸FCC, Third Annual Report, 1997 WL 2451, at ¶¶ 143-44 (reporting that, as of 1996, 47 networks were at least half-owned by MSOs, that MSOs had attributable interests in 12 of the 25 most heavily subscribed networks and in 8 of the 15 networks with the highest prime time ratings, and that such networks all reached at least 60 million homes).

²⁹For example, HBO/Cinemax is wholly owned by Time Warner; TCI/Liberty Media Group owns 90% of Encore/Starz!. Request TV (a pay-per-view operation) is owned by RTV Associates, L.P. TCI

In short, we're not in Kansas anymore. In every way, cable is a powerful rival of the broadcast industry with huge expenditures. There is no doubt that existing market mechanisms can easily replace the compulsory licensing of broadcast retransmissions. This industry simply does not need statutory "protection" from any program supplier or copyright owner. Indeed, in Turner Broadcasting System, Inc. v. Federal Communications Commission, 117 S. Ct. 1174 (1997), (the recent "must carry" decision), the U.S. Supreme Court acknowledged the enormous economic muscle of the cable industry, including the expansion of the cable industry and its growing vertical and horizontal integration and upheld protection for the broadcast industry from cable.

In sum, Section 111 does not need tinkering or adjustment -- it needs a sunset date.

B. The Satellite Home Viewer Act ("SHVA") and the Satellite Carrier Compulsory License.

The satellite carrier compulsory license was expressly granted on an interim basis until a market-based solution could be developed. Like cable, the satellite carrier compulsory

owns 40% of Request TV through Liberty Media Group. Tele-Communications, Inc., 1995 Annual Report 30 (1996); Tele-Communications, Inc., Form 10-K, Ex. 21 at 24 (Dec. 31, 1996). Majority shareholders of Viewer's Choice, a trade name for Pay-Per-View Network, Inc., which is a subsidiary of PPVN Holding Co., Inc., are Time Warner Cable (17%), Comcast Financial Corp. (11%), Continental Cablevision (12%), Cox Communications (20%), and TCI (10%). Finally, TCI (22%) and Time Warner (15%) have significant interests in Action Pay-Per-View. FCC, Third Annual Report, 1997 WL 2451, at App. G, Table 1.

license was intended to be a pragmatic solution to what were perceived to be hopeless entanglements of private interests and court rulings. In fact, consideration of a market solution for copyright licensing of secondary retransmissions by satellite was not a serious option because the satellite industry's chief competitor, the cable industry, was already operating under a compulsory license.

Congressional hearing records leading up to the passage of the SHVA of 1988 are devoid of any evaluation of a market-based licensing system. Rather, the focus of the hearings and the legislation itself was on how to resolve related issues, including the lack of copyright law coverage for satellite retransmissions, the lack of a definition for the term "satellite carriers" that would include scrambled transmissions, and the absence of any royalty payment mechanism for copyright owners. Other issues addressed included the desire of the industry to transmit scrambled transmissions and the need for consumers, particularly in so-called "white areas," to receive transmissions, unscrambled and legally.'

As a means of resolving still other issues, the 1988 SHVA directed the FCC to report on and address claims of price discrimination by carriers against distributors and problems with the interference with syndicated exclusivity rights of television broadcasters. To support the transmission rights of satellite

H.R. Rep. No. 100-887, Pt.II at 21 (1988), reprinted in 1988 U.S.C.C.A.N. 5609, 5649.

carriers, Congress added antipiracy enforcement provisions, permitting both civil and criminal penalties to combat unauthorized interception of signals under Section 705(a) of the Communications Act and 18 U.S.C. § 2511(a).

The Office, among others, concluded that while a market-based solution would have been preferable, it simply was not possible at that time; nevertheless, the Office said that a marketplace solution "should ultimately develop":

"The Copyright Office supports H.R. 2848 [the 1988 Act] as a short term solution to the copyright licensing problem confronting satellite carriers. Because the statutory license that would be established by the bill is of short duration, and is merely intended to provide compensation to copyright owners during the interim period in which a market place mechanism for negotiating programming licenses is evolving, the Office concludes that the bill is an appropriate solution to a difficult problem. Furthermore, because the bill encourages private negotiation and/or arbitration, the bill provides a first step toward the establishment of the marketplace solution that should ultimately develop."³¹

The House Judiciary Committee agreed and emphasized the transitional nature of the legislation, which was scheduled to sunset on December 31, 1994.³² The House Energy and Commerce Committee which also issued a report on the SHVA of 1988, emphasized the "interim" nature of the Act: "The Committee believes that the public interest will be served by creating an

³¹Statement of Ralph Oman, Register of Copyrights: Hearings Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Comm. on the Judiciary on the SHVA, H.R. Rep. 2848, 100th Cong. 1st, 2nd Sess. (1987, 1988).

³²H.R. Rep. No. 100-887, Pt. I. at 14-15 (1988) reprinted in 1988 U.S.C.C.A.N. 5577, 5617-20.

interim statutory solution that will allow carriers of broadcast signals to serve home satellite antenna users until market place solutions to the problem can be developed."³³

When Congress passed the SHVA of 1988, the satellite subscriber universe totaled a mere 322,871³⁴. All were home satellite dish ("HSD") subscribers -- customers who had purchased large (four to 10 foot) C-band dishes. At that time, there was no DBS market, or even programming uplinked to Ku-band or fixed satellites for transmission to subscribers with small dishes (18 to 36 inches).

Six years later, the SHVA was renewed with a new sunset date of December 31, 1999. In 1994, there were only about 570,000 DBS subscribers and an HSD market of 1.6 million subscribers.³⁵ But when the sunset date of the SHVA of 1988 was pushed back to December 31, 1999, by the 1994 legislation, Congress supplied a new standard for setting compulsory license fees based on fair market value.

The premise of the SHVA of 1988 was that, when the license expired in 1994, it would be replaced by free market-place arrangements. However, during the six year tenure of the

³³H.R. Rep. No. 100-887, Pt. II at 13 (1988) reprinted in 1988 U.S.C.C.A.N. 5577, 5642.

³⁴See Exhibit JP-F to the Testimony of Jerry L. Parker on behalf of the Satellite Broadcasting & Communications Association In the Matter of 1996 Satellite Carrier Royalty Rate Adjustment Proceeding, Docket No. 96-3 CARP-SRA ("Parker Testimony").

³⁵See Parker Testimony, Exhibit JP-F. See also FCC, Third Annual Report, 1997 WL 2451, at App. F (reporting 602,000 DBS subscribers and 2.1 million HSD subscribers in 1994).

SHVA of 1988, no marketplace arrangements had developed. Accordingly, Congress concluded that, if there was to be a real transition to market-based licenses and ultimate repeal of the SHVA, "fair market value" had to be the standard for determining royalties under Section 119.³⁶

In amending the SHVA, Congress also concluded that the satellite industry would be well able to pay marketplace rates. While the House Judiciary Committee noted that the satellite carriers had failed to disclose their profits or costs during the Section 119 hearing, the Committee observed that there had been "phenomenal growth in the number of subscribers since 1988" and that "[m]any satellite carriers are large businesses that are substantially owned by cable companies." The Committee also observed that the fees payable to copyright owners under Section 119 were but a "very small percentage" of monthly package prices charged to home dish owners by satellite carriers. The Committee concluded that "should the [CARP] arbitrators decide that the fair market value is substantially higher than the existing rate -- the satellite industry is able to pay such increased fees."³⁷

In but two short years after passage of the SHVA of 1994, the DBS market has burgeoned. By November 1996, DBS subscribers totalled 4.1 million, with HSD subscribers numbering approximately 2.3 million. Today, satellite carriers routinely

³⁶H.R. Rep. No. 103-703, at 10 n.26 (1994) [to accompany H.R. 1103].

³⁷H.R. Rep. No. 103-703 at 10-12 (1994) [to accompany H.R. 1103].

provide over 100 channels of programming to their subscribers -- many dozens of channels of nonbroadcast programming as well as seven superstations and 16 broadcast network signals.³⁸ Current reports place total satellite subscribership now at 6.8 million.³⁹ The numbers may be relatively smaller than cable, but the players are not. For example,

- DirectTV, Inc., a DBS operation, is owned by Hughes Network Systems, Inc. (a General Motors subsidiary) with a minority interest of 2.5% owned by AT&T, purchased in January 1996 for \$137.5 million;⁴⁰

- Primestar Partners (DBS) is jointly owned by the largest cable MSOs (Comcast, Continental Cablevision, Cox Enterprises, GE American Communications, TCI and Time Warner)⁴¹;

- Echostar Satellite Corp., a DBS operation with about 440,000 subscribers, has reportedly sold a 50% interest to ASkyB, a joint venture between Rupert Murdoch's News Corp. (parent company of Fox Television Stations and Twentieth Century Fox Film Corp.) and MCI, for \$1 billion. Echostar only began service in the second quarter of 1996;⁴²

³⁸Parker Testimony, pp. 4-7 and Exhibit JP-F.

³⁹Sky Report, Mar. 6, 1997.

⁴⁰DirectTV Forms Group to Seek New Business Opportunities, Telecommunications Reports, Apr. 21, 1997; AT&T to Make DirectTV Marketing Calls, Satellite Business News, Jan. 31, 1996, at 1.

⁴¹FCC, Third Annual Report, 1997 WL 2451, at ¶ 41.

⁴²Broadcasting & Cable, Mar. 17, 1997; Parker Testimony at p. 7; The Cable-Telco Report, Mar. 24, 1997.

• AlphaStar Television, Inc., again a DBS operation, owned by Tee-Com Electronics and the Hyundai Group, is reportedly discussing alliance with U.S. West;⁴³ and

• United Video Satellite Group, Southern Satellite Systems and Netlink USA are all affiliated with TCI⁴⁴, the nation's largest cable operator which had \$7 billion in annual revenues in 1996.⁴⁵

Executives for the satellite industry predict that it will have at least 20 million subscriber households by 2000-2001, with more than 7.5 million more subscribers in 1997 alone.⁴⁶ At least one DBS operation, ASkyB, has pegged delivery of local

⁴³Media Business Corp., Sky Report, Mar. 1996; Paul Kagan Associates, Inc., The DBS Report, June 24, 1996; DAB and Digital Delivery, Audio Week, June 24, 1996; Hyundai, Nokia Study Acquisition of Alphastar, Satellite Week, Sept. 2, 1996; Broadcasting & Cable, Mar. 17, 1997; The Cable-Telco Report, Mar. 24, 1997.

⁴⁴United Video Satellite Group, variously described as a "superstation distributor" and "provider of satellite delivered video, audio and data services", is a TCI subsidiary. Rich Brown, The Long Reach of John Malone and TCI, Broadcasting and Cable, Oct. 16, 1995; United Video Satellite Group, Inc. Stockholders Voted to Approve Merger with TeleCommunications, Inc., Broadcasting & Cable, Jan. 29, 1996. Southern Satellite Systems is a subsidiary of TCI's subsidiary Liberty Media Group. TeleCommunications, Inc., 1995 Annual Report 30 (1996); MCI Uses IRS Ruling to Argue for Keeping Time Warner Stake, Telecommunications Reports, Apr. 14, 1997 (Southern apparently set up to hold TCI's 9% stake in Time Warner as a condition of merger). Netlink is a subsidiary of Liberty Media Group and United Video. UVSG Puts Superstar Up For Sale, Satellite Business News, Jan. 11, 1997.

⁴⁵Tele-Communications, Inc., Form 10-K at 117 (Dec. 31, 1996) (1996 revenues of \$7.038 billion).

⁴⁶Cable World, Feb. 17, 1997; The Cable-Telco Report, Mar. 24, 1997.

broadcast signals to local communities as the linchpin in their plan for future growth.⁴⁷ Given their resources, satellite carriers are well able to negotiate for the rights to these signals; they, too, need no Congressional coddling.

C. Marketplace Negotiations

It is clear that Congress' primary focus in passing Section 111 and the SHVA of both 1988 and 1994 was to ensure that copyright liability was imposed on these industries for their retransmissions of over-the-air broadcast signals, with the industries obtaining rights in bulk via the compulsory license.

Elimination of the cable and satellite carrier compulsory licenses would not place these industries in an "impractical and unduly burdensome situation" by requiring separate negotiations with every copyright owner, as Congress feared so many years ago. Quite the contrary is true. For example, with respect to musical performing rights, ASCAP serves as a clearinghouse for the millions of musical compositions in our repertory as well as the repertories of more than 50 affiliated foreign performing rights societies. Together, the three U.S. performing right organizations (ASCAP, BMI and SESAC) represent virtually every single songwriter and publisher of copyrighted music in the world.

Moreover, ASCAP has long negotiated with industry groups acting on behalf of thousands of users -- local

⁴⁷ E.g., Broadcasting & Cable, Mar. 17, 1997; Padden Testimony, Apr. 15, 1997, Tr. 3654.

television, local radio, background and foreground music and the hotel/motel industries are examples of the major user industries with whom ASCAP has achieved agreement after fair and open arms-length negotiations.

The system operators are not without group representation of their own. Just last year, ASCAP negotiated an agreement on pay-per-view rights with the National Cable Television Association (the "NCTA"), acting on behalf of the bulk of the industry. We also understand that the NCTA concluded an agreement with BMI concerning local originations. As for satellite services, ASCAP has dealt with the DBS services and we are nearing agreement on certain per-pay-view rights with them. In short, we have negotiated successfully with the cable and satellite industries in other areas and negotiations to cover broadcast signals would be no different.

ASCAP has opposed the cable and satellite compulsory licenses from their inception for the same reason. Whatever justification may have existed for these licenses in 1976 -- including fear of large numbers of individual copyright negotiations -- they were not even then applicable to the licensing of music. Negotiations for the licensing of music were then and are now readily accomplished in the marketplace.⁴⁰

⁴⁰Virtually every aspect of ASCAP's operations is governed by a consent decree entered in a federal antitrust action in 1950. Pursuant to this consent decree, as amended, if ASCAP and a licensee cannot reach agreement on a license fee structure, the licensee may request the District Court in the Southern District of New York, which retains jurisdiction over the decree, to determine a reasonable fee; in such a proceeding, ASCAP bears the

Similarly, under the compulsory licenses, collective representation of owners of other types of copyrighted programming has been created. These groups include:

- Program Suppliers -- copyright owners of syndicated television series, movies and television specials;

- Joint Sports Claimants -- copyright owners of telecasts of professional and college team sports;

- Public Television Claimants -- copyright owners of programming broadcast by the Public Broadcasting Service, and not otherwise owned by other claimants;

- Broadcaster Claimants -- copyright owners of programs produced by broadcast stations such as news and local interest programs;

- Devotional Claimants -- copyright owners of syndicated programs with a religious theme, not otherwise owned by copyright owners in other claimant groups;

- Canadian Claimants -- copyright owners of programs broadcast on Canadian stations and not otherwise owned by copyright owners in other claimant groups; and,

- National Public Radio ("NPR") -- copyright owners of all programming broadcast on NPR radio stations that does not

burden of proof on the issue of reasonableness. Thus, even in the marketplace, cable and satellite providers would have price protection in dealings with ASCAP and BMI (which now also has a "rate court"). Moreover, the ASCAP consent decree requires that ASCAP grant a license to any music user that requests one. Therefore, in the absence of a compulsory license, cable systems and satellite carriers could obtain a license automatically upon request.

fall with the Music Claimants' category (represented by ASCAP, BMI and SESAC).

Thus, in a free marketplace, cable systems and satellite carriers merely would be expanding their negotiations with the same limited group of collective representatives with whom they now negotiate under the strictures of the voluntary negotiation provisions of Sections 111 and 119, in rate adjustment proceedings every five years, in retransmission consent and must-carry matters, and even in certain nonbroadcast rights contexts. There is, therefore, no justification for continuing these antiquated compulsory licenses. Indeed, at least some part of the satellite carrier contingent agrees and "would prefer to see no compulsory licenses at all" and "let all of these rights be cleared in the free market."⁴⁹

Equity for copyright owners also dictates the elimination of these licenses. Congress promulgated the cable and satellite compulsory licenses, in part, because of concerns about burdensome negotiations that might otherwise be placed on "fledgling" industries. But, there has been little, if any, focus on the burdens placed on copyright owners by maintenance of compulsory licensing schemes. Indeed, recent hearings and the legislative history leading up to the passage of the 1988 SHVA and its 1994 extension are silent on the hidden costs to

⁴⁹Padden Testimony, Apr. 15, 1997, Tr. p. 3759.

copyright owners, nor is there any discussion on the capacity of copyright owners to administer their own licenses.⁵⁰

Rather than a simple business solution where management representatives of buyers and sellers sit down and negotiate in the free market, representatives of copyright owners and the cable and satellite industries must engage in costly, time consuming and lengthy forced arbitration if, as so frequently has happened, the voluntary negotiations fail. Then, after royalty rates are established, copyright owners must negotiate among themselves about how to divide up the royalties. If they are unable to agree, again, copyright owners must engage in costly, time consuming and lengthy arbitrations, first among competing claimant groups to the same royalty pie and then, often, among claimants within the same claimant group. These additional arbitrations -- for which satellite carriers obviously incur no cost -- further reduce the amount of royalties ultimately paid to copyright owners as compensation for use of their property.

See Cable Compulsory Licenses: Hearings Before the Subcomm. on Patents, Copyrights and Trademarks of the Comm. on the Judiciary, 102nd Cong., 2d Sess (1992); Cable and Satellite Carrier Compulsory Licenses: Hearings Before the Subcomm. on Intellectual Property and Judicial Admin. of the Comm. of the Judiciary, 103rd Cong., 1st Sess. (1993).

We note also that although the Office and the satellite industry apparently have praised the satellite carrier compulsory license for its supposed ease of administration, ease of administration alone is not a justification for retaining the present system when marketplace mechanisms are already in place. The easiest license to administer would be a free one -- but that is hardly fair.

These additional layers of litigation greatly delay the payment of such royalties to the rightful copyright owners. For example, at this time, cable royalties paid in for the years 1995 and 1996 and satellite carrier royalties for the years 1992, 1993, 1994, 1995 and 1996⁵¹ remain unpaid. Twenty-five percent of 1994 cable royalties and 20% of 1993 cable royalties also remain undistributed. Moreover, there has been no global settlement among the various copyright claimant groups to any of these funds and, therefore, entitlement to cable and satellite royalties for each of these years is undetermined and subject to litigation. These unreasonable delays likely would be eliminated in the marketplace. And, permitting the royalties to earn interest during the period they are held is not an acceptable replacement for timely payment and possession of funds to which the copyright owners are rightfully and presently entitled.

D. Phased Elimination of the Cable and Satellite Carrier Compulsory Licenses.

While ASCAP would prefer immediate elimination of the cable and satellite carrier compulsory licenses, it would have no objection to a short, reasonable transition period so long as copyright owners could rely upon Congressionally-mandated sunsets. For example, the SHVA sunsets on December 31, 1999. The statute initially was to sunset on December 31, 1994; however, satellite carriers successfully lobbied Congress for an

⁵¹These figures exclude a minimal 10% distribution of 1992-1995 satellite carrier royalties made on April 3, 1997 to help copyright owners defray the significant costs of the ongoing satellite rate adjustment proceeding.

extension of their compulsory license. According to reports, the industry is still seeking a legislative solution in place of free marketplace negotiations after 1999. With recourse to a CARP always an option and the possibility of further unnecessary relief from Congress, we cannot expect that private negotiation and marketplace solutions will develop.

The House Judiciary Committee Report on extending the SHVA noted that the satellite industry had little incentive to agree with copyright owners and would rather gamble on a rate set by arbitration: "One of the principal reasons the Committee adopted the fair market value standard is to encourage the parties to agree to voluntary arrangements. Experience with the 1991 arbitration demonstrates that so long as a compulsory license is in effect with rates set below market value, satellite carriers have little or no incentive to enter into voluntary negotiations. The requirement of setting fair market rates is, therefore, deliberately calculated to act as a transitional device toward the ultimate repeal of Section 119 on December 31, 1999."

The cable compulsory license is even more egregious. The license has no sunset and there simply is no motivation to try private negotiation in the marketplace. We strongly believe that the cable compulsory license should expire with the SHVA on

H.R. Rep. No. 103-703 at 10 n.26 (1994) [to accompany H.R. 1003].

December 31, 1999 and that Congress should make clear to all parties that the laws will not be extended.

Congress, too, has already expressed reservations about the development of market-based licenses for the satellite industry while the larger, well-established cable industry enjoys a perpetual compulsory license. Accordingly, the Senate Judiciary Committee was unwilling to state that the SHVA of 1994 was the final extension of Section 119 and recognized that any further consideration of Section 119 must include an examination of the position of the cable industry as well.⁵³

Repeal of both Section 111 and 119, effective December 31, 1999, will provide ample time for copyright owners and the cable and satellite industries to employ existing marketplace mechanisms to set the fees to be paid beginning in the year 2000. And, with the certainty that the laws will not be extended under any circumstances, the parties will have real motivation to reach agreement and not postpone their negotiations.

III. THERE SHOULD BE NO EXPANSION OF ELIGIBILITY FOR THE CABLE AND SATELLITE CARRIER COMPULSORY LICENSES.

ASCAP believes that, during any limited phase-out of the cable and satellite carrier compulsory licenses, these licenses should not be expanded to encompass other types of transmission services, nor should new types of services receive their own separate compulsory licenses.

⁵³S. Rep. No. 103-407 at 8 (1994) [to accompany S. 1485 as amended].

For the reasons stated above, ASCAP believes that compulsory licensing for any video retransmission service simply is unnecessary. The reality is that the nature of these businesses requires that all of the entrants into this field have significant resources for start-up costs and program acquisition. That is certainly why the telephone companies, TCI and ASkyB are taking a leading role in these new businesses.

Moreover, expansion of existing compulsory licenses or imposition of new compulsory licenses to fit new technologies will make it more difficult for compulsory licensing schemes ever to be eliminated. New compulsory licensing schemes would place additional burdens and costs on copyright owners to participate in additional rate-making and distribution proceedings. And, expansion of the compulsory licensing system will place added administrative and operational burdens on the already overburdened Office.

It is also a given that inclusion of new technologies in current compulsory licensing schemes or creation of new ones will discourage private negotiation and inhibit the development of marketplace solutions.

Further amendment of Sections 111 and 119 to cover new types of technologies also would be unwise because it is impossible to predict the development of those technologies. For example, while the Office has sought input from affected parties concerning the eligibility for the cable compulsory license for

OVS, only one OVS is fully operational today.⁵⁴ Other telephone companies are testing such delivery systems, but the telephone companies have generally put a brake on their plans for rapid expansion of this business.⁵⁵ Simply put, there is no justification for any expansion of the existing compulsory licenses.

IV. HARMONIZATION OF SECTIONS 111 AND 119 AND IMPOSITION OF MARKETPLACE RATES WOULD BE THE ONLY SENSIBLE ALTERNATIVE TO ELIMINATION OF THE COMPULSORY LICENSE.

Should the Office determine to recommend that compulsory licensing for cable systems and satellite carriers be retained -- and we fervently hope that will not be the case -- we believe that the cable and satellite carrier compulsory licenses should be combined into a single compulsory license requiring payment of marketplace rates to copyright owners. At this juncture in the development of these industries, there is no reason for either industry to receive a leg up on the other, or to impose rates that would differ from the rates paid through free, marketplace negotiations. Harmonization of Sections 111 and 119 would also ensure equal competitive treatment of these competing industries.⁵⁶

⁵⁴FCC, Third Annual Report, 1997 WL 2451, at ¶ 71 (reporting on Bell Atlantic's operational OVS in New Jersey's Dover Township).

⁵⁵See, e.g., SNET Withdraws VDT Application: Asks For Cable Franchise, Communications Today, Jan. 25, 1996.

⁵⁶See generally Testimony of Harry M. Shooshan III on behalf of the SBCA, In the Matter of 1996 Satellite Carrier Royalty Rate Adjustment Proceeding, Docket No. 96-3 CARP-SRA (although cable systems and satellite carriers are direct competitors, satellite

Further, a simplification of the way royalties for distant signals are calculated for cable systems, together with harmonization of cable and satellite into a single compulsory licensing regime, would also ease the administrative burden on all parties affected, including the Office. Administration associated with the pay in, investment of and pay out of royalties would be eliminated as well as lengthy rate proceedings and multi-faceted layers of distribution proceedings.⁵⁷

On the other hand, the price to be paid by cable systems and satellite carriers, if these cumbersome compulsory licenses survive, should be the same rate paid by cable systems and satellite carriers for other products they purchase -- fair market value. Consideration of any other criteria merely would permit cable systems and satellite carriers to argue that they should pay less than fair market value and result in below market compensation to copyright owners for the very property that allows the cable and satellite industries to thrive and profit. These industries are well able to pay fair market value for copyrighted works and they should be required to do so. No other criteria but fair market value is necessary.

carriers pay more for carriage of superstations and network stations than their competitors).

⁵⁷Indeed, for example, as currently enacted, Section 801(b)(2)(A) of the Copyright Act generally permits adjustment of the royalty rates to be paid by Form 3 cable systems under Section 111 only to reflect "national monetary inflation or deflation" or "changes in the average rates charged cable subscribers for the basic service of providing secondary transmissions to maintain" real constant dollar levels.

CONCLUSION

The cable and satellite carrier industries no longer require permanent compulsory licenses for their retransmissions of television broadcast signals, if they ever did. These industries are not struggling entrants into the world of telecommunications -- they are now powerful rivals to the established broadcast industry.

Cable systems and satellite carriers negotiate in the free marketplace for every other product they buy or sell. No distinction should be drawn between those products -- especially as the cable and satellite industries are both equipped to negotiate in the marketplace and face no unique burdens to negotiating with copyright owners for the rights to retransmit over-the-air broadcast signals.

The message carried to Congress in recent years is that the American people want government out of the commercial marketplace. The cable and satellite carrier compulsory licenses' very existence is contrary to that principle, for they constitute a governmental intrusion into the marketplace. They are unwarranted and unnecessary.

Respectfully submitted,


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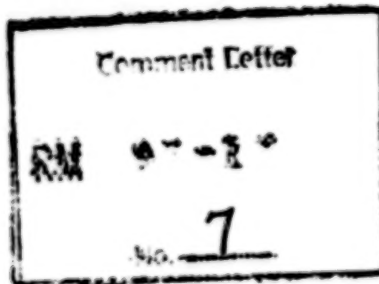
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Re: Revision of the Cable and Satellite Carrier
Compulsory Licenses, Docket 97-1

Dear Mr. Roberts:

On behalf of LIN Television Corporation, we hereby submit an original plus 14 copies of the Statement of Gregory M. Schmidt, Vice President - New Development and General Counsel.

Sincerely,

Neil K. Roman
Attorney for LIN
Television Corporation

Enclosure

**GENERAL COUNSEL
OF COPYRIGHT**

APR 28 1997

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Comment Letter

RM 97-1

7

In the Matter of)

Revision of the Cable and)
Satellite Carrier)
Compulsory Licenses)

Docket No. 97-1

**Comments of Gregory M. Schmidt, Vice President-
New Development and General Counsel, LIN Television Corp.**

I am the Vice President for New Development and General Counsel of LIN Television Corp. LIN Television owns eight television stations, including WISH in Indianapolis, Indiana, WANE in Fort Wayne, Indiana, WAND in Decatur, Illinois, KXAS in Dallas, Texas, KXAN in Austin, Texas, WAVY in Norfolk, Virginia, WTNH in Hartford, Connecticut, and WIVB in Buffalo, New York.

I submit this statement to underscore the importance of preserving the objective standard setting forth the territorial, or "white area," restrictions of the Satellite Home Viewer Act. By drawing a bright line for determining eligibility to receive satellite-delivered network programming, Congress made clear its intent not only to limit the scope of the compulsory license it was granting to satellite carriers, but also to eliminate costly and disruptive eligibility disputes and to avoid placing stations in an adversarial posture vis-à-vis their viewers.

The Satellite Home Viewer Act permits satellite carriers to provide network programming only to "unserved households." 17 U.S.C. § 119(a)(2).

Congress defined "unserved household" to include two components, both of which must be satisfied before a satellite carrier lawfully may offer network programming to a subscriber. A household is "unserved" only if (a) it "cannot receive, through use of a conventional outdoor rooftop receiving antenna, *an over-the-air signal of grade B intensity (as defined by the Federal Communications Commission)* of a primary network station affiliated with that network" and (b) it has not, within the previous 90 days, "subscribed to a cable system that provides the signal of a primary network station affiliated with that network." 17 U.S.C. § 119(d)(10) (emphasis added).

These tests clearly are *objective*. Indeed, PrimeTime 24 is urging an amendment to the Copyright Act to eliminate the current standard and to replace it with a *subjective* standard based on viewer assessment of "picture quality." We vigorously oppose any such amendment.

As an initial matter, any subjective standard would be extraordinarily difficult, if not impossible, to administer. Even assuming agreement on a uniform picture quality standard (an unlikely proposition in and of itself), the sheer number of households whose equipment and reception would have to be inspected individually would be beyond the industry's capability. In any event, the cost of such an undertaking would be enormous, particularly after factoring in the cost of resolving the disputes that inevitably would arise.

More fundamentally, such a standard would undermine the relationship local stations enjoy with their viewers. As noted, to protect their rights as the exclusive

distributors of network programming in their markets, local stations would be required to conduct case-by-case interrogations of viewers to determine whether or not the picture quality standard had been satisfied. If a station were to disagree with the viewer's assessment, it would be faced with an untenable choice: either (a) to allow the viewer to subscribe to network services via satellite, thereby losing the viewer or (b) to challenge the viewer (and, at least implicitly, the viewer's credibility), thereby alienating -- and probably losing -- the viewer.

WISH-TV's experience as the CBS affiliate in Indianapolis illustrates why an objective standard is essential. With its flat terrain, Indianapolis is a station engineer's dream. WISH-TV sends a strong, clear signal throughout the area, and few legitimate reception problems are encountered by viewers in the local market.

Nevertheless, PrimeTime 24 and other satellite carriers have marketed network packages that include CBS programming to tens of thousands of viewers residing in households located within WISH-TV's Grade A contour; indeed, most are located in the station's City Grade Contour, i.e., in or near the heart of downtown Indianapolis, where our signal is strongest. Still, WISH-TV has proceeded conservatively, generally challenging only those subscribers residing well within the FCC predicted Grade B contour. Despite the conservative challenge criteria, WISH-TV has challenged more than 20,000 subscribers of PrimeTime 24 alone.

After WISH-TV began challenging subscribers in the Indianapolis market, it received numerous telephone calls and letters of protest from challenged subscribers.

Many stated that, because of the challenges, they did not intend again to watch WISH-TV. Most important for present purposes, when we conducted signal intensity measurements at households where viewers had complained of poor picture quality, we learned that in a number of instances the problem was caused not by inadequate signal strength, but rather by faulty equipment or poor installation.

Adopting a subjective standard for determining whether a subscriber is eligible to receive network programming via satellite would only exacerbate the already substantial damage resulting from the illegal transmission of distant network programming into local markets. Not only would it place stations in an even more delicate position with viewers in their markets, but its unenforceability would create an even greater opportunity for satellite carriers to sell beyond the limited areas carved out by Congress. By contrast, the current objective standard permits stations to enforce their rights, thereby preserving the viewer base stations need to continue to serve their local markets.

Respectfully submitted,



Gregory M. Schmidt

April 28, 1997

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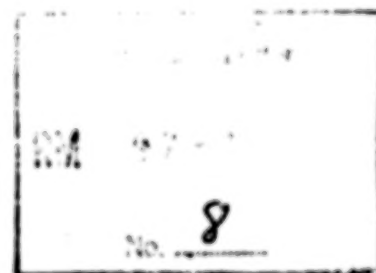
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Re: **Written Testimony of the Small Cable Business Association;
Docket No. 97-1**

Dear Sir:

We enclose for filing an original and fifteen (15) copies of the Written Testimony of the Small Cable Business Association in the above-referenced matter. Also enclosed is a copy to date-stamp and return to the courier.

If you have any questions, please call.

Very truly yours,

Howard & Howard

Eric E. Breisach

EEB:cm

Enclosures

cc: William Roberts, Esq.
Patricia Sinn, Esq.
Matthew Polka, Esq.

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Before the
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In the Matter of)

)
Revision of the Cable and Satellite)
Compulsory Licenses;)
Public Hearings)

Docket No. 97-1

GENERAL COUNCIL
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**WRITTEN TESTIMONY
OF THE
SMALL CABLE BUSINESS ASSOCIATION**

Comment Letter

RM 97-1

No. 8

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April 28, 1997

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SUMMARY

As the Copyright Office considers potential changes to the compulsory copyright license structure, it must remain acutely aware of the significant impact these decisions may have on small cable. The Small Cable Business Association ("SCBA") submits this testimony in order to highlight these areas of concern and initiate further dialog on these issues.

Cable Compulsory License Issues

SCBA strongly urges the Copyright Office to retain the compulsory license at least for small cable. As outlined below, loss of the compulsory license would have devastating financial impact on small cable:

- ◆ **Unaffordable transaction costs.** Small cable, often family operated, does not have the administrative staff or legal expertise to negotiate copyright licenses with each broadcaster. Small cable will have to use outside counsel. Even assuming low transaction costs of \$2,000 per license, this still represents at least a \$10,000 burden because the average smaller market has five local broadcast stations. When spread over small cable's subscriber base, it becomes apparent that costs of \$10 to \$200 per subscriber pose barriers to continued broadcast station carriage. Because a significant number of cable systems qualify as small (e.g., over 6,000 of the nation's approximately 11,000 cable system have fewer than 1,000 subscribers¹) loss of the compulsory license would have widespread implications.

¹*Television and Cable Factbook No. 64* at I-81.

- ◆ **Create New Program Access Problems.** Small cable already pays significantly more than larger cable operators for broadcast retransmission consent and satellite programming. The principal reason for the disparity in program cost arises from unequal bargaining power. Requiring cable operators to separately negotiate copyright licenses will only expand the scope of the current program access problems faced by small cable.
- ◆ **Necessary to Continue Must-Carry.** Mandatory carriage requires the existence of a compulsory license. Congress recognized this when it required broadcasters to choose between mandatory carriage and the ability to seek compensation for carriage. If given both rights concurrently, broadcasters could demand virtually any price in return for the right to retransmit the signal on the cable system.

Satellite Compulsory License Issues

SCBA neither supports nor opposes the grant of a compulsory license to satellite carriers, including DBS providers. As Congress approaches this subject, it must reach a key public interest decision -- whether to support or cast aside the principle of localism it has embodied for the past 63 years.

- ◆ **SCBA Urges Congress to Continue Supporting Localism.** Local video programming now plays an integral part in the functioning of our democracy. It provides a forum for discussion of controversial issues of public importance and has become essential to ensure an informed electorate. Vital local programming takes a number of forms, including:
 - **Local news**
 - **Local sports**
 - **Local public affairs and political interest**
 - **Local emergency notifications**
 - **Public, education and government access**

- **Local business advertisers**
- **Local political advertisers**

- ◆ **As a Provider of National Service, DBS Hurts Localism.** As a multi-channel video programming provider, DBS has captured new subscribers at exponential rates. As a provider of national -- not local -- programming, DBS does not advance localism. By drawing viewers away from outlets providing local programming, DBS has hurt localism and efforts to create and distribute local programming. This harm flows to all producers, distributors and local viewers through diminution or abolition of local programming.
- ◆ **Congress Should Strengthen, not Weaken, the SHVA.** SCBA members have encountered widespread importation of network and other superstation signals in blatant violation of the Satellite Home Viewer Act ("SHVA"). This hurts local programming providers. DBS providers have admitted in testimony before Congress how easy evasion of the SHVA's restrictions has become.² SCBA members have witnessed not only lax enforcement by DBS providers, but open and aggressive action by installers and DBS distributors to violate SHVA. Against the background of open and flagrant violations of SHVA, the Copyright Office must exercise caution not to recommend changes to SHVA, such as a subjective picture quality test, that would encourage even further violations of the SHVA.
- ◆ **Congress Should Create Complete Parity with Respect to Regulation of Program Carriage.** To quote Senator McCain, "Television is television."³ If Congress changes the current system by creating a DBS compulsory license, Congress should move towards a

²Transcript of testimony before the Senate Committee on Commerce, Science and Transportation, April 10, 1997 (Hearing Transcript) at 16.

³Hearing Transcript at 1.

system where cable, OVS and DBS receive identical treatment. DBS no longer warrants exemption from comprehensive regulation as a fledgling industry. DBS owners now rank among the world's largest media companies and DBS has shown dramatic growth, taking more than half of the new video subscribers in 1996. At a minimum, regulatory parity would include:

- **Imposing the same must-carry requirement on DBS, OVS and cable.**
- **Applying network non-duplication, syndicated exclusivity and sports blackout provisions equally to DBS, OVS and cable.**
- **Requiring DBS providers to make financial contributions to support local programming until they can comply with must-carry requirements.**

The future of local programming, especially in rural America, is on the line in this proceeding. If regulatory parity is not achieved, DBS may not be a competitor in the years to come, it may be the only provider of video programming to rural America. The ability of rural America to use video technology to keep informed, protected and participatory in the affairs of our democracy warrants significant consideration of the concerns and suggestions raised by SCBA.

**Before the
Library of Congress
Copyright Office
Washington, D.C. 20540**

In the Matter of)	
)	
Revision of the Cable and Satellite)	Docket No. 97-1
Compulsory Licenses;)	
Public Hearings)	

**WRITTEN TESTIMONY
OF THE
SMALL CABLE BUSINESS ASSOCIATION**

I. INTRODUCTION

SCBA provides the following testimony on issues of special concern to small cable. These issues include the devastating financial impact that loss of the compulsory license would have on small cable. Additionally, grant of the compulsory license that DBS providers have openly sought on Capitol Hill must be accompanied by complete regulatory parity with respect to broadcast signal carriage.

Formed nearly four years ago, SCBA today represents nearly 300 small cable operators, most of whom have 1,000 or fewer subscribers. SCBA began as small operators banded together to cope with the regulatory burdens imposed by the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act). Today, SCBA remains active ensuring that Washington policy makers, including the Copyright Office, understand the unique impact statutes and regulations have on small cable and customers of small cable.

II. THE VIABILITY OF SMALL CABLE MANDATES THE CONTINUATION OF THE CABLE COMPULSORY LICENSE.

The Copyright Office's *Request for Comments (RFC)*⁴ regarding the continuation of the cable compulsory license raises issues critical to small cable. Discontinuation of the compulsory license will saddle small cable with unaffordable transaction costs when measured on a per subscriber basis. The absence of a compulsory license would also leave small cable vulnerable to disparate pricing structures and the inability to access programming.

A. The economics of independent small cable mandates continuation of the compulsory license.

As the Copyright Office notes, all cable operators, including small cable, retransmit broadcast signals pursuant to a compulsory copyright license.⁵ This license allows the retransmission of broadcast signals so long as cable carriage comports with the regulations of the Federal Communications Commission (FCC).⁶ The compulsory license carries with it two significant advantages: (1) it minimizes the transaction cost of procuring the license; and (2) it facilitates imposition of other broadcast signal carriage requirements such as must-carry. Elimination of the compulsory license would create a disparately harsh burden on small cable, seriously compromising its ability to carry local off-air broadcast signals.

⁴*Notice of public meetings and request for comments*, Revision of the Cable and Satellite Carrier Compulsory Licenses, 62 FR 13396 (March 20, 1997).

⁵17 U.S.C. § 111(b).

⁶17 U.S.C. § 111(c).

1. Negotiations with individual broadcasters can carry significant transaction costs for small cable.

Negotiating copyright licenses will require cable operators to incur two costs: (1) the cost of employee time diverted from serving customers; and (2) the cost of outside assistance to negotiate agreements in this highly specialized area of the law.

Small cable typically employs small work forces. Very small systems often operate using the efforts of family members of the family that owns the system. Larger systems typically have very little administrative staff. Many small cable operators simply do not have sufficient depth in their staffs to devote time to negotiate copyright licenses with each broadcaster in their areas and still run their businesses.

Beyond the availability of staff, most small cable operators lack the expertise to negotiate an equitable agreement without the use of outside legal counsel. The use of outside experts, such as lawyers, will significantly raise the cost of securing copyright licenses.

The total cost of negotiating and executing a license allowing secondary retransmission will vary based on a number of factors unique to each negotiation. Small operators will likely incur at least \$2,000 in outside counsel fees for each license. In contentious or complex scenarios that cost could increase significantly.

To accurately consider the adverse financial impact on small cable, one must look beyond the cost of negotiating individual licenses and consider the cumulative cost. Many small systems operate in small markets. These markets have, on average five off-air signals.⁷ Even assuming that the small operator can obtain a license by incurring only \$2,000 in costs, the total burden for the operator is

⁷Average of total stations in the 100-plus markets. *Television and Cable Factbook No. 64* at 1-77.

\$10,000 -- \$2,000 for each of five broadcast stations. Because small cable typically has small subscriber bases, one must consider not just the total cost, but the affordability of the cost measured in terms of amounts per subscriber.

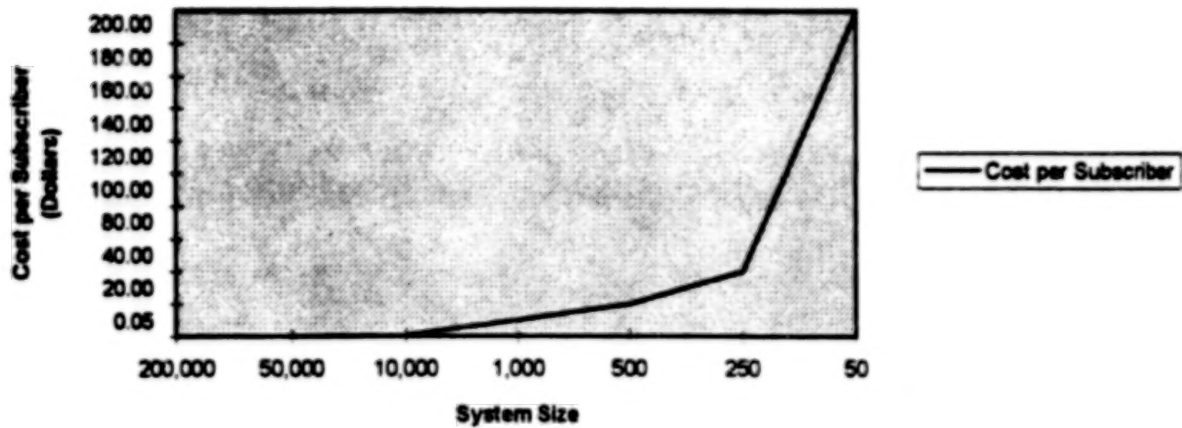
2. **The limited subscriber base in small markets typically served by small cable results in high per subscriber costs to negotiate separate copyright licenses.**

Small cable operators and their subscribers remain especially vulnerable to burdens that impose significant transaction costs. This results from the inability to spread and recover these costs over a large number of customers, either in a particular system, or from other company operations. A high per subscriber costs results. Consider the following example where a cable operator incurs an aggregate transaction cost of \$10,000:

System Size (Subscribers)	Transaction Cost	Cost per Subscriber
200,000	\$10,000	\$0.05
50,000	\$10,000	\$0.20
10,000	\$10,000	\$1.00
1,000	\$10,000	\$10.00
500	\$10,000	\$20.00
250	\$10,000	\$40.00
50	\$10,000	\$200.00

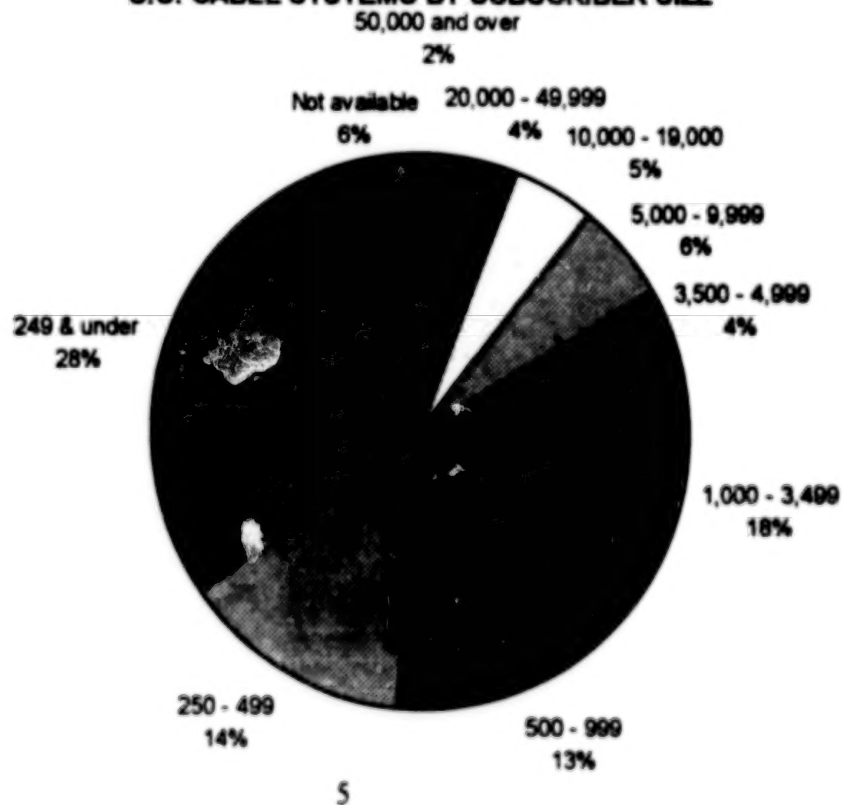
The following graphic representation depicts the sharp increase in per subscriber costs as system size decreases:

Per Subscriber Transaction Costs



To fully understand the impact of these relationships, one must take into consideration the immense number of small systems. The following chart shows the number of cable systems, grouped by their size:

U.S. CABLE SYSTEMS BY SUBSCRIBER SIZE



As this graph depicts, almost 30% of the cable systems have fewer than 250 subscribers. Cumulatively, cable systems with 1,000 or fewer subscribers make up almost 75% of the nation's over 11,000 systems. These systems typically serve more rural areas with lower subscriber densities.

The FCC has recognized the necessity of crafting public policy in a way that does not impose high per subscriber costs on small cable.⁸ SCBA strongly urges the Copyright Office to exercise the same concern for avoidance of imposing unaffordable burdens on small cable.

B. Requiring small cable to negotiate individual copyright licenses creates another set of program access problems.

SCBA and its members have confronted major hurdles in their efforts to secure programming on terms comparable to larger multiple system operators (MSOs). Small cable has difficulty negotiating equitable rates for programming because of unequal bargaining power. Small cable typically pays significantly higher programming costs than larger operators. Broadcasters have followed this same pattern in their pricing of retransmission consent.⁹ The same dynamic will impose on small cable higher costs per subscriber for a copyright license.

To help level the playing field, small cable created a buying co-operative, the National Cable Television Co-Operative (NCTC). In the co-operative, small cable members pool their subscribers and purchase programming at lower rates. While this helps relieve the problem, it does not eliminate it as programmers are not compelled to sell programming to the co-operative. Several major programmers steadfastly refuse.

⁸See, e.g., *Sixth Report and Order* and *Eleventh Order on Reconsideration*, MM Docket Nos. 92-266 and 93-215 (released June 5, 1995) ("*Small Systems Order*") at ¶ 56.

⁹See, e.g., *SCBA Petition to Deny*, BJ CCT-950823KF-LJ (filed April 25, 1996).

Co-operatives would not help to alleviate any of the burdens broadcasters could place on small cable following repeal of the compulsory license. Small cable typically could not amass a sufficient subscriber base within a given television market to increase bargaining power. National co-operatives do not help small cable when negotiating with an in-market broadcaster. Small cable has enough difficulty resolving retransmission consent issues. Adding copyright license negotiations on top of that would make broadcast signal carriage by small cable increasingly difficult, if not impossible.

C. Broadcasters can currently seek additional compensation for signal carriage.

The *RFC* asks whether the compulsory license should be negotiated in the open market.¹⁰ In many respects, broadcasters already have this option. Broadcasters cannot argue that the current system undercompensates them. Congress gave broadcasters the right to seek compensation for carriage above that provided by copyright. Broadcasters now have the right to require a grant of retransmission consent and to receive additional compensation as a condition of carriage.¹¹ This effectively allows broadcasters to allow marketplace pricing of the right to retransmit their signals.

D. Must-carry cannot exist without compulsory licensing.

Mandatory carriage requires the existence of a compulsory license. Congress cannot require carriage without giving operators the right to carry the signal. To do otherwise places operators at the mercy of the broadcaster who can charge any level of compensation because the operator must either pay to obtain the copyright license or violate federal law by not carrying the signal.

¹⁰*RFC* at p. 4.

¹¹47 U.S.C. § 325(b).

Congress recognized and avoided creating the practical impossibility of allowing a broadcaster to both require payment as a precondition to carriage and enforce carriage requirements. Under the current scheme, a broadcaster must choose between retransmission consent and must-carry.¹² If Congress eliminates the compulsory license, it must also eliminate must-carry.

E. Conclusion

The transaction costs incurred by a cable operator resulting from negotiating copyright licenses with each and every broadcast television station, and potentially the station's program suppliers (e.g., major league sports), would place an intolerable financial burden on small cable. The resulting per subscriber costs simply could not be absorbed or passed through to subscribers. Because mandatory carriage under must-carry requires a compulsory licence, small cable would no longer have an obligation to carry local broadcast television. The high transaction costs of seeking a license would likely result in widespread cessation of broadcast station carriage by small cable, hurting many constituencies, including cable, broadcast and the viewing public that relies on "free TV." The Copyright Office must recommend continuation of the compulsory license, at least for small cable.

III. ANY ACTION CONGRESS TAKES MUST PRESERVE LOCAL PROGRAMMING

Concerning the SHVA, SCBA address three areas of vital importance to small cable: (1) retention without any dilution of the current "white area" restrictions; (2) allowing aggrieved cable operators a cause of action to enforce violations of "white area" restrictions; and (3) grant of a broad compulsory license as advocated by large DBS interests.

¹²47 U.S.C. § 325(b)(3)(B).

A. Congress must confront a key public policy issue.

As Congress considers changes to the compulsory license scheme for satellite carriers, Congress must decide to either support or cast aside the principle of localism. If Congress seeks to continue support of localism, it must consider carefully the impact of changes to regulation of a national programming service that currently not only does not deliver local signals or serve any local programming needs but also by escaping those requirements competes unfairly with providers of local programming. If Congress decides to cast away localism, it will give the green light to national programming concerns such as DBS to steamroll those program providers that have invested in the requisite infrastructure to deliver local programming. This will cause dramatic reductions in the ranks of small and rural broadcasters and small and rural cable.

1. The principle of localism has become central to regulation of video program distribution.

As currently structured, DBS threatens the longstanding goal of promoting and preserving local programming -- otherwise known as localism. Congress first mandated localism in 1934 as part of the Communications Act of 1934:

[t]he Commission shall make such distribution of licenses . . . among the several states and communities as to provide a fair, efficient and equitable distribution of radio service to each of the same.¹³

a. The FCC has woven the principle of localism throughout its regulatory scheme.

Localism has served as the cornerstone of communications policy and regulation for the last 63 years. Some of the following examples demonstrate the extent to which the FCC has gone to promote this objective:

¹³47 U.S.C. § 307(b).

- ◆ **Chain Broadcasting Rules.** In 1941, as network programmers gained increasing control over the programming of their affiliates, the FCC acted to severely restrict the terms that networks could demand in their affiliation agreements.¹⁴ By limiting network influence on programming, the Commission effectively returned program control to the hands of local management. At the time, this represented a bold action as radio networks had greatly fostered the growth and development of the radio broadcasting industry.
- ◆ **Broadcast License Distribution.** In 1952, the FCC developed a table of assignments that reserved frequencies in each of 1,274 communities, ensuring that each would have the spectrum available for at least one local broadcast station. The Commission believed that this "protects the interests of the public residing in smaller cities and rural areas more adequately than any other system for distribution of service"¹⁵
- ◆ **Local Origination.** In 1969, the FCC initiated a rule requiring large television operators to originate a significant amount of local programming to both ensure diversity of views and also to satisfy local programming needs.¹⁶
- ◆ **Must-Carry Rules.** The FCC first imposed a mandate to carry local broadcast signals in 1965. The FCC justified its actions as necessary to ensure the financial viability of broadcast programming. The FCC attempted to enforce mandatory

¹⁴*Report on Chain Broadcasting*, Commission Order No. 37, Dkt. 5060 (May 1941).

¹⁵*Sixth Report and Order*, 41 FCC 148 (1952).

¹⁶*First Report and Order*, 20 FCC 2d 201 (1969).

carriage over the ensuing 30 years despite successful court challenges to its Constitutional validity.

- ◆ **Distant Signal Importation Limits.** The FCC has also limited a cable operator's ability to import signals from other markets that might compete with local broadcast signals. In 1972, the FCC created market quota rules through the may-carry rules.¹⁷ Under those rules, operators could only import a certain number of distant signals. The FCC currently maintains restrictions prohibiting the importation of duplicative network programming (network non-duplication rules) and similar rules governing syndicated programming (syndicated exclusivity rules).

b. Congress has recently acted to perpetuate localism.

As recently as 1992, Congress passed legislation squarely aimed at preserving localism.

- ◆ **Must-Carry.** Congress, relying on the need to preserve localism in television broadcasting, mandated cable carriage of local broadcast signals.¹⁸

A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation.

Broadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate.¹⁹

¹⁷*Cable Television Report*, FCC 72-108 (1972).

¹⁸47 U.S.C. §§ 534 and 535.

¹⁹1992 Cable Act at § 2(a)(10) and (11).

- ◆ **DBS Localism Rulemaking.** Congress made clear to the Commission that it must either enact rules that require the carriage of local programming on DBS or, in the alternative, protect local programming from the siphoning effects of DBS. Congress ordered the Commission to:

[W]ithin 180 days after the date of enactment of this section, initiate a rulemaking proceeding . . . Such proceeding also shall examine the opportunities that the establishment of direct broadcast satellite service provides for the principle of localism under this Act, and the methods by which such principle may be served through technological and other developments in, or regulation of, such service.²⁰

The FCC has recommenced the above rulemaking. SCBA is filing comments concurrently in that rulemaking.²¹

2. **The FCC has previously refused to authorize programming services that did not deliver local signals.**

Long ago, the FCC refused to authorize a predecessor to DBS. In 1952, the FCC rejected a proposal to reserve higher UHF frequencies for "stratovision," a method of telecasting from an airborne transmitter that could supply 81 percent of the United States with one signal. The FCC determined that harm to local broadcast stations outweighed the prospect of delivering this signal to unserved rural areas.²²

²⁰47 U.S.C. § 335(a).

²¹Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Service Obligations, MM Docket No. 93-25 (comments due April 28, 1997).

²²*Sixth Report and Order*, 41 FCC 148 at 216 (1952).

B. Weakening signal importation restrictions will injure local programmers.

The *RFC* offers a number of proposed changes to the "white area" restrictions. SCBA urges the Copyright Office to carefully evaluate the harm that any weakening will have on local programming.

1. Any subjective qualification test will exponentially increase the already widespread violations of the SHVA.

The proposed picture quality test, or any other test other than signal intensity will lead to abuses and enforcement nightmares. SCBA members have encountered numerous cases of widespread abuses where DBS providers import distant network signals into markets where their subscribers could easily receive the broadcast off the air. Even Mr. Rupert Murdoch, while attempting to blame the problem solely on unscrupulous subscribers, admits how easily anyone can violate the law:

So that if you're living in Washington and you have direct television, you've only got to tell a little fib that you can't get the local stations, and they'll turn on stations from Atlanta and New York and so on and the local broadcasters are extremely upset by this. . . .²³

Contrary to Mr. Murdoch's inference that subscribers principally perpetrate the "little fib," many SCBA members have witnessed aggressive installers and franchised distributors actively engaging in these unlawful deceptions. Because signal distribution from the satellite is not sufficiently geographically limited, the only way to maintain integrity of the distribution system is through authorizations at the site of the reception equipment. Mr. Murdoch claims that telephone verification will allow control over signal distribution. SCBA doubts this.

²³Testimony of Rupert Murdoch, Hearing Transcript at 16.

SCBA understands that DBS providers claim to currently provide periodic telephone verification of a descrambler's location. Several SCBA members have purchased DBS systems and installed them not at their home addresses, but at different office locations. Even when the members' home and office are located in different television markets, the box, despite its constant connection to the telephone line, allows receipt of programming. This suggests one of two things. Either DBS providers do not check the location of the box, or they do and fail to voluntarily enforce the provisions of the SHVA.

The DBS providers' lax enforcement of current abuses will only foster additional and greater abuses in the future if unscrupulous distributors, installers or others can base the determination on their opinion of picture quality. Further, with digital television, picture quality should become irrelevant. Either a customer receives the signal intact or it has no signal.

SCBA strongly opposes any scheme that even indirectly weakens the enforceability of the SHVA in light of significant abuses of the white area exception to distant network or superstation signal importation.

C. Congress must create complete parity of program carriage regulations.

The DBS providers have already gone on record as seeking a full compulsory license for the carriage of broadcast signals.²⁴ SCBA neither supports nor opposes the grant of a compulsory license to DBS providers so long as any grant of the license is accompanied by full regulatory parity with respect to signal carriage. This will require legislation and rulemakings that go far beyond the subject matter under direct jurisdiction of the Copyright Office. Nevertheless, because they must be dealt with concurrently, we discuss them in this forum.

²⁴*Id.* at 7.

1. "Television is television."

In a recent hearing before the Senate Commerce, Science and Transportation Committee, Senator McCain said it best:

Television is television, regardless of whether it's delivered over the air by broadcasting, through wire or fiber, by cable, by microwave for multi-channel, multi-point distribution systems, or from satellite by DBS.²⁵

SCBA agrees. Congress has established a national telecommunications policy that it should apply equally to all programming providers. Congress endorsed this philosophy when it established open video systems (OVS) that, for the most part, have identical or equivalent rights and obligations to traditional cable operators.²⁶ Congress must closely examine the competitive playing field and consider whether allowing DBS to continue slipping through the regulatory net constitutes good public policy.

2. DBS no longer warrants special treatment.

DBS has benefitted from its perception as the upstart provider of multi-channel video programming services. DBS is the least regulated of any multi-channel video programming providers. As the FCC recently noted:

The DBS industry has grown and changed dramatically over the last four years.²⁷

Examination of key industry statistics bears this out:

²⁵Hearing Transcript at 1.

²⁶See, e.g., 47 U.S.C. § 573(c)(2)(A) (surrogate franchise fees); § 573(c)(1)(B) (PEG access, must-carry and retransmission consent).

²⁷*Public Notice*, Comments Sought in DBS Public Interest Rulemaking, MM Docket No. 93-25 (January 31, 1997).

- ◆ **Explosive subscriber growth.** The Commission reported almost 4 million DBS subscribers as of October 1996, with at least one service growing by as much as 140,000 subscribers a month.²⁸ The Commission has noted that "DBS services have grown at a rate making DBS receiving equipment one of the most successful new consumer electronics product introductions in history in terms of units sold."²⁹
- ◆ **Capturing new subscribers.** During 1996, cable captured fewer than half of the new subscribers to multi-channel video programming services.³⁰ Most of these new subscribers went to DBS providers.
- ◆ **Vast expansion of channel offerings.** Since releasing the *NPRM*, at least one DBS provider has increased its channel offerings by almost 900%. In 1993, the Commission noted that Primestar offered 11 channels of programming.³¹ In 1997, the Commission noted that Primestar provided 95 channels, with plans to expand to 150 channels.³² Other DBS providers also offer a large number of channels:

²⁸ *1996 Competition Report* at Appendix C, Tables 1 and 2.

²⁹ *Id.* at ¶ 40.

³⁰ Testimony of Amos Hostettler, CEO, Continental Cable Television, Hearing Transcript at 6.

³¹ 8 FCC Rcd 1589 at 1591, n.14.

³² *Third Annual Report, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 96-133 (released January 2, 1997) ("*1996 Competition Report*") at ¶ 41.

DBS Provider	Number of Channels Offered ³³
DIRECTV/USSB	200
Primestar	95 (plans to expand to 150)
EchoStar	Over 100
American Sky Broadcasting (ASkyB)	150 planned

These channel totals illustrate that DBS has progressed far beyond an experimental service. With the proposed merger of EchoStar and ASkyB, a new class of DBS provider will be born before the end of this year. Occupying two full orbital slots with the capability of delivering 250 or more channels, DBS has become a formidable competitor to cable, especially small cable that must invest significant capital to construct and maintain the infrastructure necessary to deliver local programming to subscribers in rural America.

- ◆ **Large Media Companies Backing DBS.** The participation of several large cable MSOs in Primestar is dwarfed by the entry of ASkyB's owner, media giant The News Corporation, its partner MCI Communications. This merger will consolidate two full orbital slots in a major media company with staggering financial resources. DBS has moved well beyond the "fledgling industry" that the FCC recommended not regulating four years ago.³⁴

DBS operators represent formidable competitors that must compete on a level playing field.

³³1996 *Competition Report* at ¶ 41.

³⁴*Notice of Proposed Rulemaking*, 8 FCC Rcd 1589 at 1596, ¶ 36.

3. Local programmers, especially those in small markets, need must-carry.

a. Broadcast television.

Congress went to great lengths in the 1992 Cable Act to protect local broadcasters from the financial harm they would incur if not carried by cable. Congressional findings of harm and the risk of the financial collapse of even a few broadcasters mandated the imposition of significant signal carriage requirements:

A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation.

Broadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate.³⁵

Congress also reiterated the critical importance of maintaining the viability of "free TV" and its ability to create local programming. Congress found that if not carried by cable:

[T]he economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized.³⁶

In defending the must-carry statute against the First Amendment challenge, the government:

"downplays the importance of showing a risk to the broadcast industry as a whole and suggests the loss of even a few broadcast stations "is a matter of critical importance."³⁷

In upholding the must-carry statute, the Supreme Court validated the government's two key considerations:

³⁵1992 Cable Act at § 2(a)(10) and (11).

³⁶*Id.* at § 2(a)(16).

³⁷*Turner Broadcasting System, Inc. v. Federal Communications Commission*, No. 95-992, slip op. at 18 (March 31, 1997).

The Government's assertion that "the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry," [citations omitted] rests on two component propositions: First, "significant numbers of broadcast stations will be refused carriage on cable systems" absent must-carry [citations omitted] "Second, the broadcast stations denied carriage will either deteriorate to a substantial degree or fail altogether."³⁸

All television stations will be adversely impacted if not carried on a multi-channel video programming provider that has significant viewership. As noted by the Supreme Court, a five percent reduction in cable viewers would result in an almost \$1.5 million reduction in gross revenue of a large market station.³⁹ The amount of revenue loss for a small market would be less; however, it would still have the same proportionate impact because a small station has a smaller budget.

SCBA has never had a significant problem with must-carry. SCBA acknowledges that small cable and small television stations need each other. As noted by SCBA's former Chairman, David Kinley, in a recent viewpoint editorial, small broadcasters provide small cable with not only product, but local product that differentiates it from other multi-channel video programming providers.⁴⁰ Small broadcast, on the other hand, cannot survive without the audience it reaches on small cable. The combination of small cable and small broadcast serves the principle of localism.

b. Small cable operators.

Small cable will continue to suffer injury if DBS can continue to unfairly compete by delivering distant beamed in signals that compete directly with local off-air channels carried by the cable system. This prevalent practice provides DBS with national network programming that siphons

³⁸*Id.* at slip op. at 28.

³⁹*Turner* slip op. at 53.

⁴⁰*Multichannel News*, Vol. 18, No. 16, April 21, 1997 at 57.

viewers away from the local broadcast and local cable systems, hurting the ability to produce and distribute local programming.

By avoiding local programming requirements, DBS has been able to provide its product at significantly lower capital investment and operating cost measured on a per subscriber basis. Small cable has made significant capital investment in plant and equipment and incurs the higher cost of delivering signals to more rural, less densely populated areas.⁴¹ This capital investment by small cable and higher operating costs make delivery of local signals possible. DBS has not incurred such significant capital investments to serve rural areas. The following chart shows the disparities:

DBS	\$87.50 ⁴²
Small Cable	\$750 - \$1,500 ⁴³

Small cable also incurs substantially higher operating costs due to low densities and long distances involved in traveling to remote sections of cable plant. Another significant cost involves programming. Small cable typically pays a significant premium on programming compared to large operators, including DBS providers. Consequently, DBS providers can obtain the same national product as a small cable operator, but at a greatly reduced price. This inequality mandates action in the near term.

⁴¹*Small Systems Order* at ¶ 56.

⁴²Prepared Testimony of Rupert Murdoch, Chairman and CEO, The News Corporation Limited before the Senate Committee on Commerce, Science and Transportation ("Prepared Testimony") reports total initial capital investment of \$700 million with a target of 8 million customers within five years.

⁴³This represents the average cost of small cable aerial plant construction divided by average rural densities. Because the rural densities can range widely, the cost per subscriber can widely vary. In all cases, however, the capital investment of a small operator significantly exceeds that of a DBS provider.

c. **Local business and political advertisers.**

As DBS shuts down local programming outlets, an important segment of the local communities becomes shut out as well -- local advertisers, both commercial advertisers and political advertisers. Local businesses and political candidates have only two viable outlets for video advertising: (1) cable; and (2) local broadcast.

Cable systems currently provide an important access vehicle for local advertising. Almost 3,000⁴⁴ cable systems offer local advertising insertions over the feeds of national satellite delivered programming services. Referred to as "ad avails," they provide low-cost video advertising. Even more systems offer character-generated crawls across various channels including program guides and some satellite delivered networks such as The Weather Channel.

DBS does not have the ability, nor does it claim that it will have the ability, to insert local advertising. DBS will provide unaltered national satellite feeds, or if overlaid, will overlay with national advertising. Local businesses and candidates for elected office will only have broadcast television to air video messages.

Local broadcast will remain the only avenue for local advertising. The prices charged for broadcast air time has typically placed this medium out of reach of smaller businesses. If a local broadcast station cannot retain viewers in light of unfair siphoning by DBS, it will cease operations, closing one more outlet for commercial and political advertising. As stations go out of businesses, the cost of remaining slots at other broadcast stations will increase as more advertisers try to place their advertisements in fewer available slots -- even though the advertisements will likely reach fewer viewers.

⁴⁴*Television and Cable Factbook No. 64*, at I-80.

DBS has the potential of stifling the ability of local advertisers and politicians to use video advertising by effectively either eliminating or substantially reducing the viewership of those outlets that can provide local video advertising. Unless the public policy adopted by Congress carefully avoids this result, small and local businesses will face difficulty competing with national chains that have access to national outlets for video advertising and candidates for political office will not have any video outlet to disseminate their messages.

d. Local emergency management.

Many cable systems currently have some type of emergency notification system. The FCC has under development guidelines for national emergency alerts. Cable operators typically provide some type of local emergency warnings in conjunction with local civil defense and emergency management personnel.

DBS cannot provide local emergency messaging. It will have no way to provide audio and video interrupt let alone the actual emergency message. A reduced number of local broadcast television stations will only worsen this situation.

e. Local public, education and government access.

Many communities have some form of public, education and/or government access. If DBS can compete unfairly with small cable, the viewers of these important local programming sources will decrease, lessening their utility. With the cablecasting of local government meetings becoming almost commonplace, the decreased viewership of small cable will significantly injure the efforts of government to communicate with its constituents. This curtailment of information will reduce citizen participation in governmental affairs. Additionally, it will hinder the vital public interest of ensuring an informed electorate.

4. Congress and the FCC must create a unified signal carriage regulatory model applied to cable, OVS and DBS.

Assuming that Congress acts to provide DBS with a compulsory copyright license, Congress and the FCC must adopt a regulatory framework governing signal carriage issues comparable to other similarly situated providers of multi-channel video programming providers, including cable and OVS. We review several key provisions below:

a. Impose must-carry on DBS.

Mandatory carriage of local broadcast signals represents the cornerstone of a unitary signal carriage policy. The only way to achieve regulatory parity between cable, OVS and DBS is to have the same must-carry requirement. This will require Congress to either expand the must-carry requirement to DBS, repeal it for cable and OVS, or rework the provisions and apply a new must-carry standard on all multi-channel video programming providers.

(1) Carriage obligations essential to preserve local programming.

Congress has recently made the policy determination that mandatory carriage of local off-air signals was essential to the financial viability of many broadcast stations.⁴⁵ Last month, the United States Supreme Court upheld the Congressional findings and declared the must-carry requirements consistent with a cable operator's First Amendment protections.⁴⁶ As DBS continues its dramatic growth, its failure to carry any or all local broadcast signals will result in increasing harm to local broadcast stations.

⁴⁵1992 Cable Act § 2(a)(16).

⁴⁶*Turner* slip op. at 79.

Congress must make local signal carriage mandatory for DBS for two reasons. Despite Mr. Murdoch's recent testimony suggesting voluntary broadcast signal carriage, a voluntary standard fails to overcome serious concerns. First, no rational basis exists for imposing a statutory requirement on two types of multi-channel video programming providers (i.e., cable and OVS) and allowing voluntary compliance by a third (i.e., DBS). Second, the DBS industry cannot agree on whether it should deliver local broadcast signals.

At least one DBS provider plans to provide local off-air programming. In recent hearings before the Senate Committee on Commerce, Science and Transportation, Mr. Murdoch testified that American Sky Broadcasting plans to deliver local broadcasting signals using a variety of technologies. In his written testimony, Mr. Murdoch explains his plans:

[B]y fall of this year, our goal is for 25-30% of U.S. households to be able to receive their local broadcast stations on SKY. Our targeted number grows to 50% of households by the middle of next year and to 75% or more by late next year. In the remaining 25% of households, SKY will install an antenna and a special set-top box which will receive local broadcast stations off-air and seamlessly integrate those stations into our program package and into our electronic on-screen program guide. One remote control, no clumsy A/B switches and no on-screen program guides that leave off local broadcast stations.⁴⁷

The major problem with this scheme is that ASkyB does not plan to carry all local stations. Rather, it appears ready to carry only the four networks and "major independents."⁴⁸ One press report quoted a spokesperson of ASkyB that its DBS service planned to carry only a single national Public Broadcasting Services (PBS) feed, not individual local PBS stations.⁴⁹ Although Mr. Murdoch

⁴⁷Prepared Testimony at 2.

⁴⁸Testimony of Rupert Murdoch Hearing Transcript at 9.

⁴⁹*Sky Executives Pitch Broadcasters*, Cable Word Magazine, Vol. 9, No. 11, March 17, 1997 at 147.

has subsequently contradicted this claim, the conflicting position statements coming within only weeks of one another cast aspersions on the credibility of ASkyB's subsequent assertions about local signal carriage. The testimony also appears to leave smaller independents out of any DBS carriage scenario, sentencing them to a slow but certain death. To quote Mr. Hubbard, the CEO of another DBS provider and owner of broadcast television properties:

I will tell you this as a local broadcaster, if Sky were to come to a market in which we operate a TV station, and were to carry the TV stations from that market and our station for some reason were to be left out, I think we'd be in deep, deep trouble.

I understand that Sky wants to carry the local, what he calls the major independents. I think those are carrying major sports. But I feel sorry for the poor little guy who got a TV station who is left out of the mix.⁵⁰

Mr. Hubbard announced at the hearings that his company, DIRECTV had decided not to carry any local programming:

I can tell you we're not going to follow suit and we and DIRECTV are not going to present local stations.⁵¹

The constantly changing positions of ASkyB and the absence of a unified position among the DBS providers mandates that Congress adopt a must-carry requirement for DBS providers.

(2) Must-carry framework might require modifications.

SCBA does not necessarily advocate adoption of the current must-carry model. For example, ASkyB proposes use of a technology in smaller markets that does not require retransmission of the broadcast signal, but rather receives it over the air and integrates the signals at the set-top box.⁵² If

⁵⁰Testimony of Stanley Hubbard, President and CEO, Hubbard Broadcasting, Inc., Hearing Transcript at 9 (emphasis added).

⁵¹*Id.* at 24 (emphasis added).

⁵²Testimony of Rupert Murdoch, Hearing Transcript at 7.

this presents a viable technology, then perhaps that should satisfy the must-carry requirement so long as all local signals with must-carry status become integrated into the electronic channel guide. If Congress considers this option, it must require all incumbent customers of the DBS provider to receive the hardware and software necessary to integrate the local signals. If adopted by Congress for DBS, to maintain regulatory parity, Congress must allow cable and OVS to use similar methods to comply with their must-carry requirements.

This plan could advance the important public policy objective of increasing the diversity of voices on small cable systems. Set-top integration of off-air signals in areas where off-air reception is widely available would free-up five channels for the average rural small cable system. A small operator could remove broadcast signals from the cable system and rely on off-air reception at the customer's home. Assuming that the average small system offers 36 channels of service, this would effectively represent a 14% increase in channel capacity at a cost of only \$30 - \$40 per television set.

Before accepting this alternative, however, Congress must carefully examine its viability. The facts presented by Mr. Murdoch in his April 10, 1997 testimony to the Senate Committee on Commerce, Science and Technology call into question the viability of this alternative. Mr. Murdoch stated that ASkyB would spot beam local signals into local markets at an annual cost of half a million to a million dollars.³³ In a market where ASkyB gains 25,000 customers, that represents \$20 - \$40 per subscriber, year after year. Yet in rural markets, Mr. Murdoch unveils a plan that will require a one-time cost of only \$30 to \$40.³⁴ If the methods produce the same results, why incur the significant

³³*Id.* at 15.

³⁴*Id.* at 18.

cost of spot beaming? The cost disparity strongly suggests a serious deficiency in the off-air reception and integration proposal for small markets.

Any must-carry requirement on DBS must include mandatory carriage of all qualifying broadcast signals. To preserve local programming interests, no multi-channel video programming provider should have the ability to cherry-pick the signals it will carry.

(3) DBS should support local programming where it cannot or will not carry all local signals.

DBS hurts localism. DBS does not carry local programming. DBS hurts local programmers by escaping all local public interest obligations imposed on comparable providers. DBS' failure to carry local broadcast signals, especially when coupled with widespread importation of distant competing signals in violation of the SHVA, continues to harm local programmers. Until DBS can fully comply with must-carry, DBS should compensate local programmers for the harm that DBS inflicts.

Congress should consider an immediately effective opt-out provision under which a DBS provider that did not, could not or chose not to comply with must-carry requirements would pay a percentage of gross revenues into a national fund to support local program providers and distributors. This fund would help ensure the continued financial viability of local programming sources even when attempting to compete with a national service that can deliver its product at a substantially lower cost in part because it escapes all local public interest requirements.

b. Impose other signal carriage requirements.

With the right to retransmit broadcast signals comes the obligations to restrict carriage to avoid harm to local programmers. The FCC has established a network of regulations that

accomplishes just that. Components of this regulatory scheme include provisions governing network non-duplication, syndicated exclusivity and the sports blackout rules.

(1) Distant signal importation limits.

The FCC has imposed two important limits on a cable and OVS provider's ability to import distant signals into a local market. First, if a local network affiliate has exclusive rights to network programming generally, the cable or OVS provider cannot import a distant signal affiliated with the same network into the local market.⁵⁵ Similarly, providers cannot import a signal carrying syndicated programming for which a local station holds exclusive broadcast rights.⁵⁶ These rules combine to enforce exclusive programming rights that a local station may have purchased. Protecting these market exclusivity rights helps protect sources that also generate significant local programming.

(2) Sports blackouts.

The FCC established a comprehensive scheme to protect local sports teams from the financial harm resulting from live telecast of home games within the home market.⁵⁷ The FCC forbids cablecasting of such games where the team's owner provides the requisite notice.⁵⁸ A multi-channel video programming provider cannot undercut the local station that blacks out the sporting event by importing a distant signal not subject to the same blackout. Allowing distant signal importation under these circumstances will undermine local broadcasters.

⁵⁵47 CFR §§ 76.92-97.

⁵⁶47 CFR §§ 76.151-163.

⁵⁷*First Report and Order*, 20 FCC 2d 201 (1969).

⁵⁸47 CFR § 76.67.

(3) Leased commercial access.

Leased commercial access is important to note, not as a direct control on program carriage, but rather in comparison to the public interest programming requirement imposed on DBS operators. Cable operators must surrender up to 15% of their channel capacity to unaffiliated programmers.⁵⁹ Congress intended to increase the diversity of voices by removing an operator's editorial control over a percentage of its channels. This goal looked to overall diversity of speakers and has no nexus to local programming (i.e., the law did not set aside any leased access privileges for local programmers).

Congress has imposed a similar set aside for DBS operators,⁶⁰ except they will likely be able to choose the programming so long as it serves the public interest. Serving the public interest is not necessarily the same as serving the local interest. So long as DBS continues to provide strictly national satellite programming, it cannot provide programming to meet the local needs of a particular community.

Comparing leased commercial access obligations to those DBS public interest programming obligations is important because DBS operators have recently inferred that satisfaction of this public interest programming set aside is comparable to the localism interest satisfied by cable, OVS and local broadcast.⁶¹ This is simply incorrect. Congress must hold DBS accountable for advancing the principle of localism or compensating local program providers for the harm that DBS inflicts by failing to carry local programming.

⁵⁹47 USC § 532.

⁶⁰47 USC § 335(8)(I) (requires a four to seven percent set aside).

⁶¹Murdoch Testimony, Hearing Transcript at 7-8.

D. Enforceable Parity.

1. **Blatant and widespread violations of current DBS broadcast carriage provisions warrant strong enforcement measures for all laws governing DBS operations.**

As detailed at length earlier, SCBA members have encountered numerous cases of widespread abuses of the SHVA. The level of non-compliance coupled with an apparent unwillingness by the DBS providers to enforce compliance, warrants the enactment of strong enforcement provisions.

2. **Any aggrieved party, including small cable, must have a right to seek enforcement of parity provisions.**

Operators who know about abuses remain relatively helpless as they currently have no avenue to require enforcement. Congress should provide all persons aggrieved by the conduct, including cable operators, standing to bring a cause of action.

3. **The Commission should allow recovery of statutory damages and attorney fees for those that bring successful claims of rule violations.**

For each discovered violation, dozens go undetected. Local programming providers need a mechanism that can act as a sufficient deterrent to misconduct. Borrowing from the copyright statutes, the Commission should establish significant statutory damages for each violation as well as the automatic award of attorney fees and other costs of pursuing enforcement of the law.

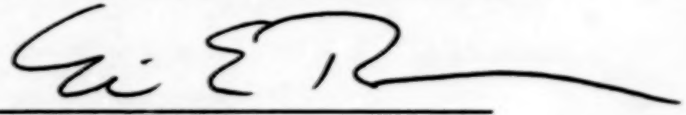
E. Conclusion.

This Office must carefully balance any recommendations for change. Any changes should cause a shift towards complete regulatory parity. The absence of parity will continue to provide DBS an advantage that will likely continue to inflict increasingly greater harm on local program providers as DBS's market share increases in the coming years. Absent regulatory parity, in the coming years

DBS may not be a competitor, but rather the sole provider of any video programming service in rural America.

Respectfully submitted,

SMALL CABLE BUSINESS ASSOCIATION

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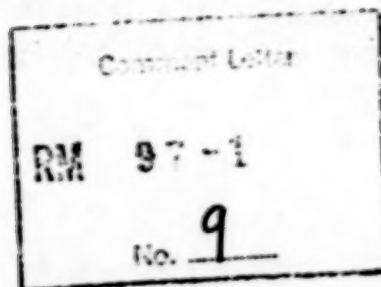
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Office of General Counsel
Copyright Office
James Madison Memorial Building
Room LM-403
First and Independence SE
Washington, DC 20540



Re: Revision of the Cable and Satellite Carrier Compulsory License, Docket
No. 97-1

To whom it may concern:

The Satellite Broadcasting and Communications Association (SBCA) respectfully submits the attached comments for consideration in the above-captioned proceeding. Please find enclosed an original and fifteen copies pursuant to the Copyright Office rules, to be distributed to the appropriate parties.

Sincerely,

Andrew R. Paul
Senior Vice President

ARP/mh
Enclosures



ORIGINAL

**Before the
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In the Matter of

**Revision of the Cable and Satellite
Carrier Compulsory License**

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Docket No. 97-1

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**COMMENTS OF
THE SATELLITE BROADCASTING AND
COMMUNICATIONS ASSOCIATION OF AMERICA**

I. INTRODUCTION

The Satellite Broadcasting and Communications Association of America ("SBCA") respectfully submits these comments to the Copyright Office for consideration in the above-referenced proceeding. The SBCA is the national trade association which represents all segments of the Direct-to-Home ("DTH") industry. The Association's members include the providers of Direct Broadcast Satellite services, the major programming networks and premium video services, manufacturers of equipment for DTH services of all antenna sizes, equipment distributors, program packagers for C-Band services and approximately 2,500

DTH retail dealers of all sizes who are the point of sale for consumers. The SBCA welcomes the opportunity to participate in this process and to provide the Copyright Office with its input on the satellite compulsory license and related issues.

As an initial matter, the SBCA takes this opportunity to applaud The Copyright Office for setting up a fair and open process and for its commitment to engage in a comprehensive review of these issues. The Copyright Office has been charged with a very important task: reviewing the existing compulsory licensing regimes and reporting to Congress its findings and recommendations. As the Office no doubt recognizes, the multichannel video programming industry, and particularly DTH satellite, has a lot at stake in this debate. Accordingly, the SBCA urges the Copyright Office to carefully consider the potential effect of its recommendations to Congress. The Copyright Office should establish as one of its goals a balance between the policy objectives of the copyright laws and the policy objectives of the nation's communications laws. The Copyright Office should be mindful of the intent of Congress over the last decade to promote competition among multichannel video program technologies.

To the DTH industry, the satellite compulsory license is a key competitive tool that has provided enormous benefits to consumers and copyright holders.

* ASkyB is not party to SBCA's comments.

The SBCA believes that a statutory copyright license for the satellite industry is essential and in the public interest.

At the same time, however, SBCA welcomes this review of the compulsory licensing regimes and has a number of specific recommendations for changes to the current satellite license. The objective of these proposals is to bring about some measure of parity with the compulsory licensing regimes for other multichannel video program distributors. Furthermore, the SBCA believes that while it may seem desirable to "harmonize" all compulsory licenses, the nature of satellite distribution of video programming warrants that the satellite compulsory license should remain a separate section within the Copyright Act. We do not believe that a so-called "unitary license" would be an appropriate vehicle for the satellite industry, given its national format.

II. THE SATELLITE COMPULSORY LICENSE IS NECESSARY

One of the fundamental questions the Copyright Office raises in this proceeding is whether the compulsory license is still necessary. The SBCA asserts that not only is the license necessary, it is critical to the ability of the DTH industry to fulfill the promise of a truly competitive multichannel video program marketplace. The SBCA believes that compulsory licensing is the best way to achieve the twin goals of copyright law: rewarding creativity and encouraging public dissemination of copyrighted works.

In 1986, the fledgling satellite industry responded to consumer demand for video programming and began providing superstations and network signals to satellite subscribers. At the time there were approximately 1.6 million households receiving video programming by satellite. The DTH industry recognized its responsibility under the U.S. copyright laws to ensure that copyright holders whose programs were being retransmitted via satellite were compensated. In the early days, this was no easy task since the status of satellite carriers vis-à-vis the 1976 Act which established the Section 111 cable compulsory license was unclear. In response, satellite carriers set aside funds to cover their liability for copyright royalties and sought direction from the Copyright Office.

Following litigation, the status of satellite carriers was resolved in 1988 with the enactment of the Satellite Home Viewer Act. (P.L. 100-667) In considering the legislation that ultimately authorized the satellite compulsory license, Congress implicitly recognized that utilizing a compulsory license to clear the programming contained in retransmitted broadcast signals would facilitate bringing the programming to DTH consumers while compensating copyright owners for their works. A similar licensing regime was already in place for the cable industry in Section 111 of the Copyright Act so Congress logically extended the concept to the DTH industry.

The license enacted in 1988 was contemplated for the niche industry that DTH was at the time - a tiny universe of large, C-Band dish owners with primarily a rural bent. Since that time, however, the DTH industry has experienced phenomenal growth, particularly in the last three years, yet its subscriber base is only a fraction of that of the cable industry. Industry reports estimate the current number of DTH satellite dishes at 7 million. This includes homes receiving video programming from both DBS and C-Band technology. By contrast the other multichannel video program technologies paying royalties under Section 111 reach an estimated 66 million households (cable, MMDS and SMATV).

It is important to point out that in 1976 when the cable compulsory license was first enacted, the nascent cable industry had approximately the same number of subscribers as DTH does today. Like the cable industry in 1976, the DTH industry is not in a position to bear the tremendous cost and administrative burden involved in clearing the rights to all programs retransmitted on broadcast signals. In fact, under current marketplace conditions, it would be virtually impossible for any multichannel video distributor to negotiate all the rights to all the programming carried in retransmitted broadcast signals because there is no clearinghouse in the market to enable private transactions. Thus, the circumstances which justified enactment of the cable compulsory license in 1976 and the satellite compulsory license in 1988 remain today. Retention of the satellite license is entirely appropriate.

Furthermore, the SBCA believes that the number of subscribers attributed to a particular multichannel video technology has little relevance to the debate over whether compulsory licensing is still necessary. The fact remains that the transaction costs associated with obtaining the license to retransmit hundreds of programs carried on a broadcast signal are prohibitive. The principal benefit of compulsory licensing to multichannel video program providers is its function as a de facto central clearinghouse, thus obviating the need to negotiate thousands of separate license agreements. Until there is a workable alternative to compulsory licensing devised by the copyright owners, a statutory license remains a necessity.

III. COMPULSORY LICENSING FULFILLS IMPORTANT PUBLIC POLICY OBJECTIVES

The SBCA submits that by any objective standard both the cable and satellite compulsory licenses have been extremely successful. Compulsory licensing has achieved the proper balance between the competing interests of copyright owners and the public. The current licensing regimes have ensured that copyright owners receive the compensation to which they are entitled, and that the public enjoys wide dissemination of copyrighted works. Indeed, by any measure copyright owners have been handsomely rewarded for their creativity and investment. Royalty collections under the satellite carrier license amounted to approximately \$29 million in 1996. This compares with the \$6.5 million collected in 1992, the year of the first arbitration proceeding at which the current

agreements that some rights holders have negotiated to supplement the royalty fees. Nor do they account for the fact that a substantial portion of the programming carried on superstations today is privately licensed pursuant to the Federal Communications Commission's syndicated exclusivity rules.

Fears that the compulsory license would distort the economics of the video marketplace and lead to a proliferation of retransmitted broadcast signals have proven to be unfounded. If programming is undesirable or unpopular with the public, it will not achieve the audience necessary to justify its distribution regardless of the availability of a compulsory license. The recent discontinuation of operations of WOR as a "syndex-free" station is a prime example. Despite the compulsory license, the viewer demand for this programming was not sufficient to justify the continued retransmission of its broadcast signal. It is now carried in the C-Band as a "syndex" signal at the full 17.5 cents.

There is absolutely no evidence that compulsory licensing has stifled creativity or limited investment in new programming. To the contrary, there is more video programming available today than ever before. The proliferation of new program services, and the demand for channel capacity for their carriage by both DTH and cable, is ample testimony to the surge in new program sources and their desire to find a place in video distribution. The greatly expanded

channel capacity of DTH systems has resulted in increased opportunities for copyright owners to develop and distribute new programming. Today, DTH viewers can choose from a plethora of specialized sports packages, movie channels and program networks despite the fact that much of this programming may also be available on retransmitted broadcast signals. By the same token, there are today fewer superstations than there were five years ago at the time the rates were readjusted by arbitration. Nonetheless, the DTH industry has greatly expanded the audience for video programming. In fact, for some new program networks, DTH distribution comprises their largest subscriber group.

In short, the SBCA believes that the weight of evidence demonstrates that compulsory licensing is a valid and appropriate mechanism by which to promote the objectives of copyright law. SBCA strongly supports retaining compulsory licensing for the retransmission of video programming. In our view the satellite compulsory license -- to the extent that it has compensated rights holders and facilitated public dissemination of copyright materials -- has been a "win-win" proposition for copyright owners, multichannel video program providers and consumers. This success should be ample proof that compulsory licensing should remain part of the multichannel video programming landscape.

IV. COMPULSORY LICENSING REGIMES SHOULD BE COMPETITIVELY NEUTRAL

While SBCA strongly supports continuation of compulsory licensing, it believes just as strongly that the current statutory license for satellite carriers is badly in need of reform. As set forth under the Satellite Home Viewer Act, the satellite compulsory license puts the DTH industry at a significant competitive disadvantage in a number of ways. First, the royalty rates that the DTH industry pays for the retransmission of broadcast signals are significantly higher than the effective rates paid by other multichannel video program distribution technologies which benefit from compulsory licensing provided for in a different section of the Act. Further, the process by which the rates are set guarantees that they will continue to rise unchecked under the current regime. Secondly, DTH providers have little certainty and no control over the duration of the license since it is subject to automatic sunset under the statute. Finally, DTH subscribers face unique restrictions on their ability to subscribe to certain satellite programming.

A. Royalty Rates for All Compulsory Licenses Should be Set in a Comparable Manner

The royalty rates under the satellite compulsory license are higher than the effective royalty rates under the cable compulsory license. For the period ending June 30th 1997, satellite carriers pay \$.06, \$.14, or \$.175 per subscriber for each network or superstation signal retransmitted. By contrast, the SBCA estimates that under Section 111 the effective 1995/2 royalty rates for all cable systems to be \$.025 for network signals and \$.098 for superstations.

Under the Satellite Home Viewer Act of 1986, Congress originally set the royalty rates for the new satellite compulsory license. These rates were based on the royalty rates under Section 111. In the fourth year of the original satellite compulsory license, Congress required the parties to engage in voluntary negotiations to set new rates, and failing that, mandated arbitration to set the royalty rates for the remaining two years of the license. As a result of arbitration in 1992, the satellite royalty rates increased by 20 to 50%.

The DTH industry was forced to accept an even less favorable arbitration regime as a condition for extension of the satellite license in 1994. As the Copyright Office is well aware, there is an arbitration process now under way to establish the rates for the remaining two years of the satellite license. As a result of that of that proceeding, the DTH industry faces the prospect of yet another increase in royalty fees. It is conceivable that by 1999 (when the current license sunsets) satellite royalty rates will have increased over the original rates by 60 to 150%. This is well in excess of the rate of inflation during that time frame. By contrast, during this same period royalty rates under Section 111 will not have been adjusted once.

The combination of voluntary negotiations and compulsory arbitration have resulted in royalty rates that are significantly higher than the royalty rates for other multichannel video program technologies. The DTH industry simply

cannot remain competitive with other multichannel video program technologies at the present rate of royalty increases, especially when our competitors enjoy stable rates. The Copyright Office must recognize that in today's competitive marketplace, the disparity in royalty rates between compulsory licensing regimes conflicts with federal communications policies designed to promote competition in the delivery of multichannel video programming to consumers.

The SBCA believes that the reason royalty rates have increased to such anti-competitive levels is directly related to the manner in which satellite royalty rates are set. Under the satellite compulsory license, royalty rate determinations are the result of a two-step process consisting of voluntary negotiations followed by compulsory arbitration, if necessary.

Clearly, the principal objective of the regime set forth under Section 119 was to facilitate a marketplace alternative to compulsory licensing. However, after nearly 10 years in operation this regime has not produced the intended result. The Congress should concede that while this two-step system may have seemed workable in theory in 1988, it has not achieved its intended objective. To the contrary, this process has had disastrous results for the DTH industry.

For a number of reasons, most largely beyond the control of DTH providers, voluntary negotiations have not produced private licensing

agreements. Satellite royalty rates have increased to the point where they bear no relationship to royalty rates for DTH competitors. Additionally, the arbitration process is time-consuming and extremely expensive. Finally, the arbitration process is not conducive to the kind of policy judgments necessary to balance the competitive concerns of the DTH industry with the interests of copyright owners.

The lack of any meaningful progress toward a market-based alternative to compulsory licensing under the current system suggests that Congress miscalculated when it set up the two-phase regime in the Satellite Home Viewer Act. It appears that Congress may have overestimated the interest of rights holders to seek an alternative to the statutory license and underestimated the difficulties in developing such a system.

The SBCA recommends that the current royalty rate determination process under Section 119 be replaced by a regime that more closely resembles the royalty rate determination process for other multichannel video programming technologies. Rather than relying upon a two-phase system of voluntary negotiations and compulsory arbitration, the royalty rates under the satellite compulsory license should be set in the statute and subject to periodic review.

B. Duration of All Compulsory Licenses Should Be Comparable

The SCA cannot overstate the effect the temporary nature of the satellite compulsory license has on DTH providers. The programming retransmitted to satellite subscribers via the compulsory license is some of the most popular programming available on satellite. Yet, DTH providers and consumers face incredible uncertainty over the continued availability of such programming. This uncertainty makes it difficult for DTH providers, many of whom have made substantial start-up investments in their operations, to develop any meaningful long range business plans.

While the Association appreciates that Congress believed the temporary nature of the license was necessary to facilitate the development of a marketplace approach to compulsory licensing, as noted above, despite nearly ten years of this regime a marketplace solution is no more a reality than it was in 1988. This is simply a fact of doing business in such a diverse marketplace with a plethora of copyright owners who have yet to make any concerted effort to enable private clearance of program rights.

Rather than spur the development of a marketplace alternative to the compulsory license, the temporary nature of the satellite compulsory license has put the DTH industry at a competitive and political disadvantage. Unlike the other multichannel video program technologies, every few years the DTH industry must divert its focus and resources from building its business to lobbying Congress. The extension of the Satellite Home Viewer Act, indeed

even passage of the technical corrections to the Act, have been caught up in the debate over other, sometimes unrelated, copyright issues.

Given the apparent ineffectiveness of a short term compulsory license in bringing about a marketplace alternative, the SBCA questions the continued validity of sunseting the satellite compulsory license or extending the license for no more than five or six years at a time. Consequently, the Association supports the permanent or long-term extension of the license.

C. The 90-Day Restriction on Network Signal Subscription Should be Repealed

The Satellite Home Viewer Act limits reception of network signals to only those households that cannot receive a local network signal of Grade B intensity and that have not subscribed to cable service in the last 90 days. The requirement that subscribers cannot have subscribed to cable in the last 90 days is anti-competitive and should be repealed.

Congress adopted the 90-day restriction to ensure that households would not drop cable service in order qualify as an unserved household under Section 119 and be eligible to receive network signals via satellite. It is the SBCA's belief that while this provision was intended to protect local broadcasters from the possible importation of distant network signals, the effect is to unfairly penalize viewers in areas unserved by local network signals.

The Satellite Home Viewer Act already prohibits satellite dish owners from subscribing to distant network signals if they can receive the local broadcast signal over-the-air. If potential DTH subscribers are unable to receive a network signal of Grade B intensity, they should not be forced to subscribe to cable to receive local broadcast signals. The current restriction improperly favors the incumbent technology, and more importantly, denies consumers the benefits of competition.

Requiring consumers to wait 90 days after disconnecting their cable service before they can subscribe to network signals they are otherwise legally eligible to receive is a significant deterrent to satellite dish ownership. Moreover, it subjects satellite consumers to a burdensome restriction not imposed on any other multichannel video technology. For these reasons, SBCA strongly supports repeal of this provision.

V. WHITE AREA RESTRICTIONS

Local broadcasters have had a long-standing interest in preserving their markets by limiting DTH satellite network reception only to "unserved households" as prescribed in the Act. The concept arose initially in order to afford rural satellite viewers the opportunity to watch network programming, even

though it was being offered as a distant signal. In that regard, there still remains a significant base of consumers who get no television reception whatsoever. We are of the opinion that there is potential in reaching that group through joint efforts with the broadcasters if they ever showed interest in increasing their viewing audience.

At the time of enactment, this so-called "white area" provision seemed, at least on paper, to be the proper approach to distributing network signals to satellite consumers. We know now, however, that the concept, as well intended as it may have been, was fatally flawed from the start. It has turned into a nightmare for the broadcasters, the satellite carriers, and most of all, for the consumers whom it was intended to benefit.

In the first place, the Grade B field strength criterion seemed appropriate because, even though it is a predictive measure, it appeared to correlate with the apparent Grade B contour of a local broadcaster. But a DTH consumer effectively has no way to determine whether or not the signal received from a rooftop antenna is of Grade B quality, even within the predicted Grade B of a broadcaster, without actually making expensive measurements. Thus the shorthand method of determining the suitability of off-air reception became, in reality, a consumer interpretation of picture quality — i.e., is the signal viewable regardless of the location of the household. So from the outset, the impracticality of the process began to sow the seeds of consumer confusion.

Moreover, the process by which a satellite subscriber's eligibility is determined is tedious, at best, and replete with pitfalls. The consumer and carrier must make an initial determination of the subscriber's status as an "unserved household." The network is subsequently notified and has the responsibility of sending lists of new subscribers to their local affiliates. The affiliate then makes its own determination, and often 6-8 months after signing up for network service, a consumer is notified that he or she is ineligible according to the calculations of the affiliate and subsequently is "turned off" by the carrier in order to comply.

This system of processing of satellite subscribers by the networks and their affiliates has been spotty and, in the end, highly confusing to consumers, as well. Some affiliates have cleared DTH subscribers for eligibility in their areas efficiently and in a cooperative manner. Others have not responded for great lengths of time and only much later notify consumers of their eligibility, even though those consumers may have been receiving network service for some period of time. Some affiliates have issued blanket challenges to all DTH subscribers in their area, regardless of their status or eligibility for the service.

The net result has been, and can only be, a great deal of confusion and anger on the part of consumers. They do not understand why they are barred from receiving signals for which they are willing to pay. They believe, rightfully

so, that they have been treated unjustly because they have either been refused service for which they were willing to pay, or because their service was discontinued by the carrier at the behest of the local affiliate.

Overlaid on all the consumer confusion are the legal complaints which the networks have filed in Amarillo, TX, Miami, FL, and Raleigh, NC. Most alarming is the motion for preliminary injunction which they have filed in Miami. This is not the way to solve the thorny "white area" issue. The result of these actions can only result in marketplace chaos, and the ensuing harm to the satellite industry will hinder, not help, competition with the cable industry. They contribute nothing to the search for a remedy to the "white area" quandary. Instead they only exacerbate an already tenuous situation between the satellite companies and the broadcasters.

In order to try to alleviate the tensions created by the "white area" impasse, discussions have been on-going between the satellite industry and the affiliates with a view to arriving at a mutually acceptable method of determining consumer eligibility. There has been significant leadership exercised by the satellite industry in exploring and developing "white area" initiatives. While there has been substantial progress made between the parties, we cannot at this juncture predict with any clear certainty that an accord will be reached which will be acceptable to everyone. This makes it even more imperative that the

Copyright Office examine this matter thoroughly and make recommendations to the Congress which will provide relief in this urgent matter.

So as a practical matter, the challenge system and other "white area" features incorporated into the 1994 SHVA extension have only made the situation worse and encouraged even more uncooperative behavior by some of the network affiliates. In reality, these legislative changes have penalized consumers unfairly in many cases and through no fault of their own. In the long run, it is only serving to disrupt the longer term mission of DTH satellite to take its place as a viable competitor in the television marketplace.

We hope that the Copyright Office and the Congress can join in helping to resolve what has become an unbearable situation for all the parties involved. Various SBCA member companies have proposed several approaches to resolving the "white area" issue: (1) a "bright line" test which entails a "go, no-go" approach to consumer eligibility; (2) a picture quality test; and (3) a compensation mechanism for subscribers within the Grade B contour. Each has its own merits, as well as potential drawbacks. But in any event, the current system is in such grave disrepair that any of these approaches are better than what we have today, as long as consumer rights are protected.

The "white area" system is so flawed that we fervently recommend that the Copyright Office and the Congress revamp the current format by taking into

account the changing nature of the video marketplace, coupled with the powerful application of satellite technology as a highly efficient distribution means which can only benefit consumers in the long run.

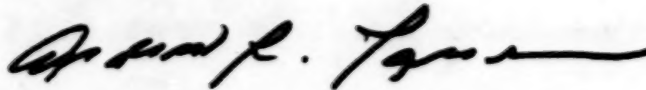
VI. CONCLUSION

The satellite compulsory license is the most efficient way to ensure that copyright owners are compensated for the use of their property and that copyrighted materials are widely disseminated to the public. The SBCA asserts that these efficiencies have not come at the expense of the copyright community. Under the compulsory license copyright owners have received millions of dollars in royalty payments, the demand for video programming has continued to increase and subscriber growth for all multichannel video program technologies continues to rise. The SBCA challenges the notion that compulsory licensing is antithetical to a free market system. To the contrary, it appears that existence of the compulsory license has not foreclosed the development of private licensing agreements that supplement the royalties collected through the compulsory license.

Nevertheless, the satellite compulsory license should be modified to promote competitive neutrality among all multichannel video program distribution technologies. To that end, the SBCA urges the Copyright Office to support the

long term extension of the satellite license, changes to the manner in which royalty rates are set, and repeal of the 90-day restriction on subscription to cable.

Submitted by:

A handwritten signature in black ink, appearing to read "Andrew R. Paul", with a long horizontal flourish extending to the right.

Andrew R. Paul
Senior Vice President
Satellite Broadcasting and Communications Assoc.
225 Reinekers Lane, Suite 600
Alexandria, VA 22314

Dated: April 25, 1997

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<u>Canadian</u>	
<u>Broadcasters</u>	<u>Agence des</u>
<u>Rights</u>	<u>droits des</u>
<u>Agency Inc.</u>	<u>radiodiffuseurs</u>
	<u>canadiens inc.</u>

April 24, 1997

Nanette Petruzzelli
Acting General Counsel
Office of the General Counsel
Copyright Office
James Madison Memorial Building
Room LM-403
First and Independence Avenue, S.E.,
Washington, D.C.
20540

GENERAL COUNSEL
OF COPYRIGHT

APR 28 1997

RECEIVED

Comment Letter	
RM	97 - 1
No.	10

Dear Ms. Petruzzelli:

Re: Revision of Cable and Satellite Carrier Compulsory Licenses

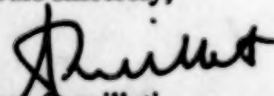
The Canadian Broadcasters Rights Agency Inc. (CBRA) is a collective that represents the rights of Canadian private commercial radio and television broadcasters in relation to the right of retransmission in general and copyright interests in general. I am writing to formally register our interest in the above noted proceeding; 62 Fed. Reg. 13396 (March 20, 1997) and 62 Fed. Reg. 18655 (April 16, 1997).

The CBRA does not wish to submit formal comments in relation to the first round of written testimony other than to state that our position is generally reflected in the submission made by the Canadian Claimants Group (CCG). Also, we do not wish to appear in the meetings that are to take place from May 6 to 9, 1997. We do wish, however, to reserve our right to file reply comments in relation to this matter, that are currently due June 16, 1997, if the need and circumstances so warrant. We thank you for the opportunity to participate in this proceeding.

I am sending you this letter by fax. I am also sending 15 copies by separate cover as required in your notice.

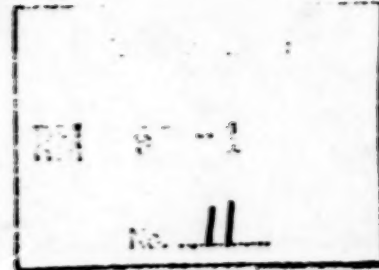
I trust this is satisfactory.

Yours sincerely,


Tony Scapillati
Executive Director

Law Offices of
Deborah K. Owen

ORIGINAL



April 28, 1997

Nanette Petruzzelli, Esquire
Acting General Counsel
Copyright Office
Room LM-403, James Madison Memorial Building
First and Independence Avenue, S.E.
Washington, D.C. 20540

GENERAL COUNSEL
OF COPYRIGHT

APR 29 1997

RECEIVED

RE: Docket No. 97-1

Dear Ms. Petruzzelli:

Pursuant to Notice in the above-referenced proceeding, enclosed are fifteen copies of the written statement of Sid Amira, Chairman and CEO of PrimeTime 24.

Please contact me if there are any questions about the enclosed.

Sincerely,

A handwritten signature in cursive script, appearing to read 'Deborah K. Owen'.

Deborah K. Owen

Enclosures (15)

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301-596-3734 301-596-3552 (fax)
dkowen@aol.com

GENERAL COUNSEL
OF COPYRIGHT

APR 10 1997

RECEIVED

**WRITTEN TESTIMONY OF SID AMIRA
CHAIRMAN AND CEO, PRIMETIME 24
BEFORE THE COPYRIGHT OFFICE
OF THE LIBRARY OF CONGRESS**

Docket No. 97-1

DATE	07-1
NO.	11

I am the Chairman and CEO of PrimeTime 24, the nation's largest and only independent satellite carrier of network television programming to the direct-to-home (DTH) market. Presently, PrimeTime 24 is locked in court battles for its survival with the networks and affiliates, who claim that we are serving ineligible consumers under the Satellite Home Viewer Act (SHVA). 17 U.S.C. § 119.

In fact, PrimeTime 24 has made tremendous efforts to ensure compliance with SHVA. In response to affiliate challenges under SHVA, we have terminated over 300,000 subscriber services. In addition, we have hired more than 25 people specifically for SHVA compliance purposes, and have spent approximately \$2.4 million per year in efforts to comply with the law. Moreover, we believe that SHVA should authorize us to serve consumers who cannot receive a picture of viewable quality over the air using a conventional rooftop antenna. Certainly, this was Congress' basic intent when SHVA was passed.

The outcome of these unproductive, costly lawsuits – costs that ultimately will be borne by the consumers – will turn on the technical language of SHVA that we believe does not implement Congress' original intent. For the sake of consumers and for the sake of healthy

competition, we respectfully request that the Copyright Office join us in urging Congress to clarify SHVA by making it explicit that households that cannot receive a picture of viewable quality over the air using a conventional rooftop antenna are "unserved households."

**SHVA must be amended because the definition
of an "unserved household" is simply unworkable.**

In 1988, and again in 1994, Congress recognized that many consumers need the alternative of satellite network programming because of the weak signal that they receive through a conventional rooftop antenna.¹ For a variety of reasons – terrain, and interference caused by buildings, bounced signals, other stations, power lines and other sources – many other consumers cannot receive network television programming of viewable quality through the use of a conventional rooftop antenna. Satellite, on the other hand, can deliver a high-quality picture virtually anywhere in the continental United States, and in recent years, hundreds of thousands of consumers have chosen to receive programming via satellite.²

¹ See, e.g., *Satellite Home Viewer Act of 1994*, Report of the House Comm. on the Judiciary to accompany H.R. 1103, H. Rpt. No. 703, 103rd Cong., 2d Sess. (1994) (In 1988, Congress enacted SHVA "so that households that cannot receive over-the-air broadcasts or cable can be supplied with television programming via home satellite dishes."); 140 Cong. Rec. H9268 *et seq.* (Sept. 20, 1994) (remarks of Rep. Boucher) ("[This is] a measure which will assure that satellite dish owners who cannot receive network signals from a local station may receive them by means of satellite delivery."); 140 Cong. Rec. S5214 (May 5, 1994) (remarks of Sen. Leahy) ("We all have constituents whose television reception is dependent on satellite technology, who cannot receive network broadcast signals and for whom cable is not a viable alternative."); 140 Cong. Rec. S3673 (March 24, 1994) (remarks of Sen. Leahy) ("[W]e should all be Senators concerned about our rural areas and interested in ensuring that our constituents therein have the opportunities to participate in the widest possible array of news, sports, entertainment, educational and informational programming that can be available through satellite technology. Direct broadcast satellite service, with its dramatically smaller and more affordable dish, holds great promise to connect all our citizens, even those in the most remote areas, in our modern information age."). While many Members of Congress referred to rural constituents in their remarks, their concern appears to have been based on the lack of viewable picture; certainly there is no logical distinction between rural, suburban or urban viewers who, for whatever reason, cannot receive such a picture.

² As the Senate Judiciary Committee noted in extending SHVA in 1994, "HSD [Home Satellite Dish] technology provided many households—especially those in rural areas—with their first link to the news, entertainment and educational programming becoming popular in the cities across the country." *Satellite Compulsory License Extension Act of 1994*, Report from the Comm. on the Judiciary to accompany S. 1485, S. Rep. No. 407, 103rd Cong.

A heated dispute between satellite providers like PrimeTime 24 and the networks and affiliates over the meaning of the definition of an "unserved household" – under SHVA, the only household that can legally receive network programming via satellite – today threatens the delivery of network programming to the great many consumers who do not otherwise have access to network programming.

Under SHVA, an "unserved household" is one that cannot receive signals of Grade B intensity over the air from local affiliates using a conventional rooftop antenna.³ Unfortunately, despite Congress' best intentions, this standard has proven completely unworkable insofar as it incorporates the FCC standard for Grade B service, which was never intended to predict the television reception in any individual household. PrimeTime 24 maintains that it was the intention of SHVA's framers to make satellite service available to households that could not receive a picture of acceptable quality. *The "Grade B intensity signal" was thought to incorporate the concept of picture quality. Time and experience have shown, however, that the current standard should be amended to make its reliance on picture quality more explicit.*

The current statutory test is unworkable for a variety of reasons. First, it attempts to apply a test developed for other purposes to an unforeseen and inappropriate task. Second, PrimeTime 24's own experience, and the complaints of consumers, demonstrate that the SHVA test does not correlate with picture quality in a significant number of households. Finally, consumers who, for all practical purposes, must make the initial determination of their eligibility

2d Sess. 4 (1994).

³ Satellite carriers are authorized to make transmissions to the public for private home viewing only. To be eligible,

when they contract with the satellite carrier whose services they seek, cannot apply the test. And, beyond that, the conduct of some affiliates, in refusing to honor the transitional "loser pays" safety net and in filing blanket challenges to all new subscribers, has complicated and inflamed an already difficult situation.

The concept of Grade B contours was developed by engineers at the FCC for purposes unrelated to those for which the broadcast industry seeks to employ it in SHVA. Most notably, Grade B contours were developed as area predictors for use in estimating the coverage of television stations' broadcast signals. The FCC never attempted to define, nor has it even addressed the concept of a "signal of Grade B intensity" with respect to an individual household using a "conventional rooftop antenna." Indeed, William H. Hassinger, the former Assistant Bureau Chief for Engineering of the FCC's Mass Media Bureau, who is another witness in these proceedings, has shown that the Grade B signal is of highly questionable value in application to individual households.⁴

Grade B contours, as originally conceived by the FCC, were not intended to predict picture quality in any particular household. A Massachusetts Institute of Technology (MIT) study, authored by W. Russell Neuman, another witness in these proceedings, documents the fact that signal strength does not correlate with picture quality. For instance, in the Pittsburgh study conducted by Mr. Neuman,⁵ field strengths were measured at 15 sites inside the predicted Grade

the subscriber also may not have subscribed within the preceding 90 days to a cable system that provides the network signal. 17 U.S.C. §§ (a)(2), (d)(5), (10).

⁴ Expert Report of William H. Hassinger (March 31, 1997), *Cannon Communications, Inc. v. PrimeTime 24 Joint Venture*, No. 2-96-CV-086 (N.D. Texas) (attached as Appendix 1).

⁵ See W. Russell Neuman, *Broadcast Television Signal Strength, Grade of Service and Picture Quality*, Media Laboratory, Massachusetts Institute of Technology (Dec. 10, 1996) (attached as Appendix 2).

A contour for an ABC affiliate, and picture quality was assessed on a scale of 1 to 5. No correlation was found between signal strength and picture quality in the samples analyzed. Topography was found to affect signal strength. The problem of multipath transmissions, whereby signals originating from the transmitter arrive at the receiver after having traveled more than one path, was found to be a significant impediment preventing signal strength from serving as a surrogate for picture quality.

PrimeTime 24 has conducted its own subscriber household tests from time to time at random locations of the quality of the picture received by nearly 200 households challenged by network affiliates. Of the households tested, 20% received a Grade B intensity signal and an acceptable picture; 20% received a Grade B intensity signal but a poor picture; and 60% did not receive a Grade B intensity signal.

Moreover, given the technical nature of the test – measuring electric field strength levels in decibels in relation to a reference value (dBu) – and the need for special measurement equipment, television viewers certainly cannot apply the test to their own households. Consumers, understandably, believe that they should be able to subscribe to satellite services if they cannot receive reasonably viewable network programming over the air. This holds true whether they live within or outside the Grade B contour or even in more heavily-settled areas where significant amounts of man-made interference are present.

The transitional rules under the 1994 SHVA amendments (which have expired) also

proved unworkable because of the failure of the "loser pays" provisions to operate as anticipated. These rules were designed to ensure that household testing of challenged subscribers by the satellite carriers would be compensated by the network affiliates where the challenges were proven by the test to be unfounded.⁶ Some affiliates have refused to abide by the clear requirements of the statute, citing as a reason the failure of the networks and satellite carriers to agree on a testing procedure.⁷

Some affiliates have routinely challenged *all* subscribers on the subscriber lists submitted to them by the carriers. As Congressman Boucher, one of the principal architects of the 1988 SHVA amendments, has observed: "Obviously, particularly in mountainous areas, this practice results in large numbers of people who cannot receive the programming by means of the local station also being disqualified from receiving it over the satellite. That result is also contrary to the balance [between the interests of satellite carriers and the affiliates] established in the 1988 legislation."⁸

A standard relying explicitly on picture quality will be in the best interests of consumers.

PrimeTime 24 has asked Congress to clarify SHVA to make explicit a picture quality test for eligibility. We urge the Copyright Office to adopt this position in its recommendation to Congress.

⁶ 17 U.S.C. § 119(a)(8); P.L. 103-369, § 6(c), 108 Stat. 3481 (1994).

⁷ See, e.g., Letter from Mark Binda, Program Director, WTVF News Channel 5 (CBS affiliate, Nashville, TN) to PrimeTime 24 (July 5, 1995); Letter from Robert E. Branson, Esq., Vice President/Chief Legal Counsel, Post-Newsweek Stations, Inc., to PrimeTime 24 (June 23, 1995) (attached as Appendix 3).

⁸ Letter from the Hon. Rick Boucher to Joe Macione, Jr. (Feb. 11, 1997) at 2 (attached as Appendix 4).

SHVA was designed to allow consumers who could not receive a viewable picture over the air to receive network television programming via satellite. Accordingly, the SHVA test should explicitly reflect the actual quality of the picture received in an individual household using a conventional rooftop antenna. Indeed, we are encouraged that several Members of Congress have expressed support for this concept. For instance, former House Courts and Intellectual Property Subcommittee Chairman Carlos Moorhead observed: "From a consumer perspective, picture quality is the key issue, and it is little comfort for a viewer who theoretically should receive a reliable signal if in fact the viewer's picture is plagued by ghosting, or other significant quality problems. This matter certainly seems appropriate for resolution as part of the industry agreement. If such an outcome is unlikely, we may be compelled to address the issue legislatively to ensure adequate protection of consumer interests."⁹ Similarly, Congressman Rick Boucher observed in a letter to the National Association of Broadcasters (NAB): "*A properly balanced agreement [between the satellite carrier and broadcast industries] must incorporate poor picture quality as a ground for receiving network programming via satellite....*" Consistent with the underlying intent of the Act, I have no doubt that Congress upon viewing these demonstrations [of unviewable TV pictures] would opt to support the eligibility of the satellite customers who have a Grade B strength signal at the rooftop but who do not receive viewable pictures."¹⁰ Finally, Representative Michael Oxley, Vice Chairman of the House Telecommunications Subcommittee, commented in a letter to a challenged subscriber: "[S]trong signal strength does not necessarily equate with quality reception. Consumers have a legitimate

⁹ Letter from the Hon. Carlos Moorhead (R.-Calif.) to Wade E. Hargrove, Esq. (Jan. 3, 1996) at 1 (attached as Appendix 5).

¹⁰ Letter from the Hon. Rick Boucher (D.-Va.) to Edward O. Fritts (Dec. 12, 1996) at 1 (emphasis supplied) (attached as Appendix 6).

argument that the quality of the signal rather than the strength of the signal alone should determine acceptable reception. This would seem to reflect the intention of the Act."¹¹

The actions of the network affiliates evidence that they, too, understand that picture quality is, in fact, SHVA's touchstone. Affiliates have granted thousands of waivers to our customers after challenges to their eligibility forced us to schedule termination of our service. Some affiliate waivers even refer to the "local obstructions" and other multipath factors that prevent subscribers from receiving the local station programming "with acceptable quality."¹²

We believe that a fair and reasonable appeals process, which would allow consumers to have a neutral third-party assess the quality of the picture that they receive, can and must replace the current scheme under which many consumers are denied network programming, and the courts are the final arbiter of a consumer's eligibility. Because the technical eligibility standard in SHVA is unworkable, PrimeTime 24 recommends making explicit the reliance on picture quality

¹¹ Letter from the Hon. Michael G. Oxley (R-Ohio) (Oct. 29, 1996) (attached as Appendix 7).

¹² See, e.g., Letter from Jerry Birdwell, Consultant, Signal and Satellite Reception, WFOR-TV 4 (CBS affiliate, Miami, FL), to Mr. Robert Gutliet (Dec. 18, 1996) ("[H]igh rise buildings can create a problem in receiving television frequencies."); Letter from Bill Peterson, Vice President & General Manager, WPEC 12 (CBS affiliate), to PrimeTime 24 (Dec. 4, 1996) ("While we believe WPEC has a Grade B signal over his [the challenged subscriber's] residence, we acknowledge it is close enough to the end of the Grade B pattern that isolated local obstructions may interfere with his reception. Mr. Plouffe reports he is within 600-yards of a dike system (around Lake Okeechobee), which may be the source of that interference."); Letter from Eric Dausman, Director of Operations & Engineering, KGW 8 (NBC affiliate, Portland, OR), to PrimeTime 24 (Nov. 22, 1995) ("The [challenged subscriber] has demonstrated to our satisfaction, that due to local obstructions, they are unable to receive KGW or one of its translators directly off the air with acceptable quality."); Letter from WTXF 29 (Fox affiliate, Philadelphia, PA) to PrimeTime 24 (June 20, 1995) ("[T]he following subscribers were challenged by us, but because of their geographic location, the terrain gives them a legitimate [sic] reason for not taking our signal off air. Please reconnect [them]."); Letter from Doug Parker, Program & Operations Manager, WBNS (CBS affiliate, Columbus, OH), to Joseph Volosky (Aug. 21, 1996) ("Although you are geographically well within our defined grade B contour area and our signal was fairly strong, your location could experience some reception problems because of the leaf density of your trees, particularly in wet weather. Because of this potential, we hereby withdraw our challenge") (all of the foregoing attached as Appendix 8).

when determining which consumers are eligible to receive network programming via satellite. With picture quality as the touchstone, an appeals process can then be developed to determine whether a consumer receives a viewable picture.

Specifically, our proposal would require the subscriber to certify by affidavit that the household cannot receive, through the use of a conventional outdoor rooftop receiving antenna, a television picture quality that a reasonable person would find acceptable. That affidavit would be provided to the network affiliate. If the network affiliate challenged the subscriber's affidavit, a picture quality evaluation of the household would be conducted by a third party who is not otherwise affiliated with either the challenging network station or the satellite carrier, and who is approved by both the station and the carrier. The evaluator would provide a snapshot of the subscriber's television picture to both the network affiliate and the satellite carrier. Under a "loser pays" arrangement, similar to the one included in the 1994 transitional signal intensity measurement procedures which expired at the end of last year,¹³ the test would be paid for by the non-prevailing party to the dispute. We believe that this process would provide a relatively simple method for protecting consumer interests and the legitimate interests of the affiliates.

Indeed, our proposal is in keeping with House Telecommunications Subcommittee Chairman Billy Tauzin's exhortation to the NAB to subscribe to an industry agreement that "would permit a *future* satellite TV subscriber to appeal, through a fair and reasonable appeals process, a determination that the subscriber's household is ineligible to receive network signal

¹³ 17 U.S.C. § 119 (a)(8); P.L. 103-369, § 6(c), 108 Stat. 3481 (1994).

**Current subscribers should be "grandfathered"
to avoid undue hardship.**

We also applaud the proposal of House Telecommunications Subcommittee Chairman Billy Tauzin to include a "grandfather clause" that would permit consumers who presently receive the network signal service via satellite to continue to do so in the future without having to bear the burden or expense of proving that they are eligible to receive the signal."¹⁵ We believe that existing consumers of satellite services, many of whom have made substantial investments in hardware, should indeed be grandfathered as part of a global solution to the problem. Without grandfathering, many consumers will suffer undue and unwarranted hardship. For instance, many subscribers have invested \$3000 to \$6000 in C-Band dishes. One of their main reasons for investing was their need to see network programming that they could not receive otherwise. These early subscribers have been seeing quality network pictures the longest, and have paid the most in subscriber fees. It would be contrary to the public interest to discontinue their services, as well as those of other existing consumers.

**Our efforts to resolve the issue by negotiation have been frustrated,
and our offer to affiliates to resolve the issue has been rejected.**

PrimeTime 24 has been attempting to settle its dispute with the networks and affiliates

¹⁴ Letter from the Hon. Billy Tauzin, Chairman of the Subcommittee on Telecommunications, Trade, and Consumer Protection of the House Committee on Commerce, to Edward O. Fritts (Feb. 13, 1997) (attached as Appendix 9) (emphasis in original).

¹⁵ *Id.*

since shortly after SHVA became law. Time and time again, the networks and affiliates have walked away from the table. The NAB has absolutely refused to consider our proposals to define eligibility with reference to picture quality. We believe that the NAB cannot recognize that poor picture quality affects hundreds of thousands of viewers. This is because their affiliates have sold advertising at rates based on the entire potential viewership of their DMAs, without adjusting their sales to account for people who could not see a reasonable television picture. If the NAB admitted that hundreds of thousands of Americans cannot watch network television because they cannot get a good picture over the air, the affiliates would have to reduce the rates that they charge advertisers, since rates are linked to the size of the audience.

One way that PrimeTime 24 has proposed to deal with the above issue is to offer to pay the affiliates a monthly fee, based on their local rate cards, for these disputed subscribers. This, like all of our proposals aimed at addressing the concerns of consumers, has been rejected. For instance, NBC responded: "We are interested in finding ways of better enforcing the current 'white area' restrictions under the [Satellite Home Viewer] Act, not providing a means by which these restrictions can be waived. Accordingly, NBC is not interested in pursuing your offer."¹⁶ Singularly missing from this response, of course, is any concern for the needs of the consumers.

The compulsory license should be continued.

PrimeTime 24, like the Satellite Broadcasting and Communications Association of

¹⁶ Letter from Diane Zipursky, Washington Counsel, National Broadcasting Company, Inc., to Sid Amira, Chairman & CEO, PrimeTime 24 (Feb. 25, 1997).

America (SBCA),¹⁷ believes that the compulsory license continues to serve an important purpose. Without it, fewer creative works would be aired, and a relatively small, independent company, like PrimeTime 24, would not be able to provide vital competition to the dominant alternatives – the network/affiliate system, and cable. Because of the compulsory license, satellite carriers can provide a wealth of programming to their subscribers. Copyright holders receive payment for their creative efforts and the public enjoys a broader range of viewing choices.

The compulsory license for satellite carriers is also critical because cable companies enjoy a compulsory license under Section 111 of the Copyright Act. 17 U.S.C. § 111. If the compulsory license for satellite companies is abandoned, we will stand at a devastating competitive disadvantage vis-à-vis the cable companies. Such an action would run contrary to the spirit behind the Telecommunications Act of 1996, P.L. 104-104, wherein Congress intended to achieve lower prices for consumers through more competition for the cable industry, not less.

Without the compulsory license, satellite carriers will simply have no effective way to deal with a multitude of copyright holders. No clearinghouse presently exists in the marketplace to serve this purpose, and the transaction costs involved in securing individual licenses would drive many companies like PrimeTime 24 out of business. The compulsory license, even if it is not perfect, is the only effective solution under the current competitive climate.

¹⁷ See Comments of the Satellite Broadcasting and Communications Association of America submitted in these proceedings.

The 90-day embargo on cable service prior to satellite subscription should be repealed.

In addition to the signal intensity requirement, SHVA currently requires "unserved households" to refrain from cable service for a period of ninety days prior to the commencement of their satellite subscription. Given cable's penetration of more than 60 percent of viewing households, this requirement in SHVA is no longer necessary. So long as consumers do not receive a viewable picture through the conventional rooftop antenna, Congress should not give an advantage to one of the competing distribution systems. These consumers should have the ability to choose between cable and satellite delivery without the annoying 90-day wait, during which they would have no network service. This requirement is unnecessarily prejudicial and should be removed.

Spot beaming is not the answer.

One of the common myths circulating about the eligibility controversy is the notion that it will become moot due to the advent of spot beaming, *i.e.*, the provision of the local affiliate's signal by satellite within its DMA. While spot beaming may become available to some households in the future, it will not be sufficient to address the needs of many other consumers for two reasons. First, by the end of the year, local signals will only be available by satellite to 25 percent of the nation's TV households, which only includes the seven largest markets. Second, it is unlikely that it will be cost-effective at any point to provide the signals of local affiliates in all markets.¹⁸ In fact, even the most optimistic (and prohibitively expensive) goal of reaching 75% of all TV households would only include the 68 largest markets out of over 200.

¹⁸ See, e.g., T. Hearn, *Elated DBS Cos. Mull Broadcast Plans*, *Multichannel News* (Aug. 26, 1996) at 3.

As a result, the current controversy regarding the correct definition of unserved households will continue.

Conclusion

PrimeTime 24 is today defending itself against lawsuits filed in three different federal courts challenging the company's delivery of network programming to consumers. We believe that these consumers do, in fact, live in "unserved households" because they cannot receive a picture of acceptable quality using a conventional rooftop antenna. Our opponents argue that these consumers do not live in unserved households, and they would much rather use an arbitrary, technical standard whose design was never intended for the measurement of individual households.

PrimeTime 24 has gone to great lengths to comply with SHVA, including hiring more people and spending approximately \$200,000 each month specifically for this purpose. When our compliance efforts failed to satisfy the networks, we entered into good faith negotiations fully intending to reach an amicable settlement that would be in the best interests of consumers. Our offer to discuss picture quality as a standard was rejected out of hand. The networks abruptly filed suit against us in Florida without notifying us that negotiations were terminated. Our plan to compensate local affiliates, which we offered in February, was similarly rejected.

In spite of these rejections, PrimeTime 24 remains committed to serving consumers unable to receive network programming over the air. This is, at its core, a consumer issue.

Consumers have been "loud and clear" in voicing their need to receive programming via satellite. Two things are critical to meeting this need. The first is the continuation of the compulsory license. Without it, experience has shown that local affiliates have little incentive to ensure that all viewers have access to network programming. The second critical element is clarifying an eligibility standard that reflects the actual ability of consumers to receive a viewable picture.

As it considers recommendations to Congress on amending SHVA, we strongly urge the Copyright Office to focus on the consumers' interests in this controversy – and accordingly, on a standard focused *explicitly* on picture quality.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
AMARILLO DIVISION

.....
CANNAN COMMUNICATIONS, INC., .

Plaintiff, .

v. .

No. 2-96-CV-086

PRIMETIME 24 JOINT VENTURE, .

Defendant. .
.....

.....
EXPERT REPORT OF WILLIAM H. HASSINGER

1.0 INTRODUCTION AND SUMMARY

This report provides my expert opinions in the case of Cannan Communications, Inc. v. PrimeTime 24. My opinions are based on: my experience in the development and oversight of engineering policy and rulemaking in television and radio broadcasting for the Federal Communications Commission, including matters involving the Commission's rules regarding field strength contours and measurements; my review of the technical literature and history of the development of the field strength contours; my review of the Satellite Home Viewer Act of 1988, as amended (the "Act" or "SHVA"); and my general training, education, and experience.

I hold the degrees of Bachelor of Science with a major in Economics from the University of Wisconsin, Madison, Wisconsin, and Master of Science in Electrical Engineering from the U.S. Naval Postgraduate School, Monterey, California.

I was employed as an electronics engineer for nearly 23 years with the Federal Communications Commission. From January 1980 to April 1987 I was the Engineering Assistant to the Chief of the Mass Media Bureau. From April 1987 until my retirement in September 1995, I was the Assistant Bureau Chief (for Engineering) of the Mass Media Bureau. During my tenure in the Bureau, I was responsible for overseeing the development of engineering policy and rulemaking in television and radio broadcasting. My duties required me to analyze and explain to Commissioners, agency managers, Congressional staff, and members of the Broadcast industry the intent and effect of technical studies, filings, regulations, and statutes. As Assistant Bureau Chief, I was the Mass Media Bureau's expert and chief spokesman on all aspects of the Federal Communications Commission's proceeding on Advanced Television (or HDTV) and, as such, helped formulate and write the proposals and policies in all Advanced Television rulemakings.

I have not testified in any cases as an expert witness, either at trial or by deposition, ~~within the preceding four years.~~ I am being compensated for preparing this report and for any anticipated testimony at the rate of \$120 per hour.

My opinions may be summarized in part as follows:

- The definition of an "unserved household" in the Act is ambiguous.
- The field strength values associated with "Grade B" service were not intended to be, and are not, a reliable indicator of television reception at any given household.
- The field strength values associated with "Grade B" service are applicable only in rural, outlying, fringe, and noise-free areas; those values have no significance to areas within the Grade A contour or to urban or suburban areas generally.
- The inclusion in the Act of the phrase, "cannot receive ... *through the use of a conventional outdoor rooftop antenna,*" suggests that a household that cannot actually receive an acceptable picture is an "unserved household" under the Act.

- Both the field strength measurement procedure set forth in section 73.686 of the Commission's rules, and the procedure used by Robert Louis du Treil, Jr. in connection with his measurements in this matter, are inadequate for determining whether a household is an "unserved household" under the Act.

2.0 THE SATELLITE HOME VIEWER ACT "UNSERVED HOUSEHOLD" STANDARD IS AMBIGUOUS.

The Act provides that an "unserved household" is one that, in pertinent part:

cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity (as defined by the Federal Communications Commission). . . .

17 U.S.C. § 119(d)(10)(A). This definition is ambiguous.

The Federal Communications Commission has no explicit definition of a "signal of grade B intensity." In section 73.683(a) of its rules, the FCC does set forth required median field strengths (in dBu)¹ associated with the Grade A and Grade B contours for the various VHF and UHF channels.² However, as I shall explain below, these dBu values and their

¹ The units used by the FCC to express field strength values reflect engineering conventions for measuring and comparing strengths of electric fields — at least for frequencies in the television band. These units are called decibels (dB) above one microvolt per meter and function on a logarithmic scale. Decibel is a relative term used to describe the ratio of two quantities, in this case field strength. For example, if one electric field is twice as strong as another, we say that it is 6 dB stronger. A ratio of 10 is equivalent to 20 dB. To describe an electric field in terms of its absolute strength, engineers express the field strength as so many decibels above or below a reference value of one microvolt per meter, abbreviated dBu. (A microvolt is one-millionth of a volt). For example, if an electric field is described as 20 dBu, its absolute value is ten times the reference value, or 10 microvolts per meter. Because an important characteristic of electronic devices is the ratio of the output signal to the input signal, decibels are often used to describe the performance of antennas, transmission lines, amplifiers and other equipment. Although not evident from this brief description, the use of decibels greatly simplifies the evaluation of complex electronic systems.

² This subsection reads in its entirety as follows:

In the authorization of TV stations, two field strength contours are considered. These are specified as Grade A and Grade B and indicate the approximate extent of coverage over average terrain in the absence of interference from other television
(continued...)

associated contours are imprecise statistical concepts that were not intended to, and do not, enable one to make a judgment about the television reception of a viewer in any particular household. Moreover, the existence or non-existence of a median field strength associated with the Grade B contour has nothing to do with the "use of a conventional outdoor rooftop receiving antenna."

2.1 History and Purpose of the Grade B Standard

In the early 1950s, the Federal Communications Commission was developing a national plan for the allocation of television broadcast channels. As part of that effort the Commission had to adopt basic planning parameters, namely the maximum permissible heights of broadcast transmitting antennas, their maximum permissible radiated powers, and the minimum permissible mileage spacings between stations operating on the same and adjacent channels. Those three parameters, and the amount of allocated radio spectrum, would determine the number of stations which could be accommodated in the television band, the density of stations that could be assigned in any given area, and the general service areas of individual stations.

² (...continued)

stations. Under actual conditions, the true coverage may vary greatly from these estimates because the terrain over any specific path is expected to be different from the average terrain on which the field strength charts were based. The required field strength, $F(50,50)$, in dB above one micro-volt per meter (dBu) for the Grade A and Grade B contours are as follows:

	Grade A (dBu)	Grade B (dBu)
Channels 2-6	68	47
Channels 7-13	71	56
Channels 14-69	74	64

47 C.F.R 73.683(a).

As part of the process of selecting a set of values for these planning parameters, the Commission and its staff, in consultation with industry, developed a model using standardized radio-frequency propagation curves, a set of technical planning factors, and a standard criterion of service. The planning factors were used to calculate the strength of the radio signal (or signals) that was needed to satisfy the standard criterion of service (described in Section 2.2 below). The propagation curves showed how far these signals would extend from a transmitting station over average terrain under various combinations of antenna power and height. If, for example, it was decided that a signal strength of 47 dBu was needed to produce an acceptable picture, then the propagation curves could be used to compare how far that 47 dBu signal would extend from a station using 50 kilowatts of power and an antenna 500 feet above the ground with the coverage of another station using 100 kilowatts of power and a 1000 foot antenna height. This process can be extended to many other combinations of power and height. Finally, this data, taken in conjunction with demographics, interference criteria, public comments, and other factors, enabled the Commission formally to adopt appropriate values for station separations, powers, and heights, and to develop a nationwide assignment plan, which it did in 1952.

2.2 The Standard Criterion of Service

As part of its effort to establish what has become the current television broadcast service, the Commission developed the concept of two levels of television service, known as Grade A and Grade B. These levels have been accurately summarized as follows:

Grade A represents a specific value of ambient median field strength existing 30 feet above ground which is deemed to be sufficiently strong, in the absence of interference from other stations, but with due consideration given to man-made noise typical of urban areas, to provide a picture which the median observer would classify as of "acceptable quality," assuming a receiving installation (antenna, transmission line and receiver) considered to be typical of suburban or not too distant areas. The signal level is sufficiently strong to provide such a picture at least 90 percent of the time at the best 70 percent of

receiving locations. The Grade A contour represents the outer geographic limits within which the median field strength equals or exceeds the Grade A value.

Grade B represents a specific value of ambient median field strength existing 30 feet above ground which is deemed to be sufficiently strong, in the absence of interference from other stations, to provide a picture which the median observer would classify as of "acceptable quality," assuming a receiving installation (antenna, transmission line and receiver) considered to be typical of outlying or near fringe areas. The signal level is sufficiently strong to provide such a picture at least 90 percent of the time at the best 50 percent of receiving locations. The Grade B contour represents the outer geographic limits within which the median field strength equals or exceeds the Grade B value.³

The standard criterion of service is the availability of a desired signal, free of interference, for at least 90% of the time. For both Grade A and B, the desired signal was one thought to provide a picture whose quality was "acceptable" to the median viewer. For Grade A service those conditions must be met for the best 70% of receiving locations. For Grade B service those conditions must be met for the best 50% of receiving locations. The Grade A service area is the area between a broadcast station's transmitter and its Grade A contour. The Grade B service area is the area within the station's Grade B contour but outside its Grade A contour. Under average conditions, the Grade B service area takes the form of a ring or doughnut. Grade A service assumes a typical receiving installation located within a typical urban or suburban area with an appreciable amount of man-made noise present. This man-made noise is electrical noise which may degrade the quality of the picture or sound carried on a television signal. The sources of man-made noise are numerous and include such things as power line transformers, automobile ignition systems, video games, hair dryers, mobile radios, paging systems, electric razors, appliance motors, garage door openers, and fish tank heaters. The noise may be continuous or intermittent. It tends to be more pervasive the closer

³ Robert A. O'Connor, Understanding Television's Grade A and Grade B Service Contours, IEEE Transactions on Broadcasting, Vol. BC-14, No. 4, at 137 (1968)(emphasis added).

people live to one another. Grade B service assumes a typical receiving installation appropriate for a rural area with no significant man-made noise present.

The planning factors reflect these conceptual differences.⁴ The following table shows the planning factor values for television channels 2 through 6. (There are corresponding values, which are of no immediate concern here, for the other television channels.) The numbers are given in decibels (dB). The totals shown at the bottom of the table are the desired signal strengths associated with the Grade A and Grade B contours in decibels above one microvolt per meter (abbreviated dBu) at a reference height of 30 feet above the ground.⁵

PLANNING FACTORS CHANNELS 2-6

FACTORS	GRADE A	GRADE B
1. Thermal Noise	7	7
2. Receiver Noise	12	12
3. Carrier to Noise Ratio	30	30
4. Transmission Line Loss	1	1
5. Dipole Factor	-3	-3
SUBTOTAL	47	47
6. Location Factor (70%)	4	0
7. Time Fading Factor	3	6
SUBTOTAL	54	53
8. Receiving Antenna Gain Factor	0	-6
9. Man-Made Noise Factor	14	0
TOTAL	68 dBu	47 dBu

⁴ See Third Notice of Further Proposed Rule Making, Federal Communications Commission, Docket Nos. 8736, 8975, 9175, 8976 (March 22, 1951).

⁵ This particular height is a standard used for comparing measurement data or in making predictions with the Commission's propagation curves. It does not imply that receiving antennas are or should be at this height. Generally, signal intensity at 15 or 20 feet will be appreciably less than at 30 feet.

The first three factors determine the amount of signal needed to overcome the electrical noise inherent in a receiver. The fourth factor is an allowance for some loss of signal strength in the line connecting the antenna with the receiver. The fifth (or dipole) factor is obtained from a standard formula which converts or relates the ambient field strength of an electromagnetic signal to the voltage of the transmission line at the output of a reference half-wave dipole antenna. ⁶The first subtotal shows that the Commission assumed that a broadcast signal must be at least 47 dBu to produce an "acceptable picture" in a receiver connected to a dipole antenna.

The sixth and seventh factors take into account the fact that VHF and UHF signals vary with time and location.⁷ The Commission's propagation curves used for predicting the coverage of a broadcast station are based on median values; that is, for any given distance the curves will show the value of field strength expected to be exceeded at the best 50% of receiving locations for 50% of the time. This means that at those locations, the signal will fall below 47 dBu half the time. Since the standard criterion of service for both Grade A and

⁶ A half-wave dipole is essentially a straight wire that is one-half wavelength in length and is divided in the middle where it connects to a transmission line. Because the wavelength of a radio signal varies with frequency, a half-wave dipole also varies in size so that a half-wave dipole for channel 2 (low frequency, long wavelength) is much larger than a half-wave dipole for channel 50 (high frequency, short wavelength). The half-wave dipole is commonly used as a reference to which other antennas are compared. Typically, rooftop antennas perform better than dipoles; conversely, set-top rabbit ears typically perform worse than a dipole.

⁷ At distances associated with Grade B service (for VHF channels) under average conditions, a signal will vary with the season and the time of day approximately plus or minus 8 db (a range of 16 db). (About 90% of the time, the signal will vary within a range of plus or minus 6 db.) As O'Connor notes, "It is a well-known phenomenon that VHF and UHF fields vary with time, diurnally and seasonally, at a given location.... It is an equally well known phenomenon that VHF and UHF fields vary with location at any given distance from the transmitter. By virtue of the relatively short wavelengths involved, it is quite common for the field strength to vary several dB over a relatively short distance of a few yards." O'Connor, *supra* note 3, at 141.

Grade B specifies that the desired signal must be available 90% of the time, the required median field strength must be increased by an appropriate amount.

From the Grade B column we see that the Commission decided that a 6 dB increase was needed to compensate for time fading for Grade B service. The second subtotal therefore means that a television signal must have a median field strength of 53 dBu to ensure that the signal exceeds 47 dBu for 90% of the time (at the best 50% of receiving locations).

Corresponding adjustments were made to the Grade A specification to define the median signal strength needed to produce an acceptable picture for 90% of the time. The time fading factor for Grade A is smaller (3 dB as opposed to 6 dB) because the Grade A contour is closer to the transmitter than the Grade B contour; at those reduced distances the signal does not vary as much seasonally or temporally from the median value as it does at the Grade B contour.⁸

The last two planning factors (receiving antenna gain and man-made noise) account for the major numerical and conceptual differences between the two services. It is assumed that rural viewers in the Grade B service area will employ an antenna with 6 dB of gain (improvement) over the reference antenna (which, by definition, has zero relative gain). This means that a lower signal intensity (47 dBu rather than 53 dBu) will satisfy the standard criterion for service in the Grade B service area. "Grade B Receiving Antenna Gain Factor" is shown as a negative quantity because it reduces the level of signal needed for service. Because antennas with 6 dB of gain tend to be large and unwieldy, particularly at VHF frequencies, we may infer that the Commission assumed that viewers in the Grade B service areas would employ rooftop antennas. In contrast, viewers in the Grade A service area are assumed to have an antenna that is no better or worse than the reference dipole. It is not clear from the planning factors what type of antenna the Commission assumed viewers in the more densely

⁸ Additionally, in specifying Grade A service, the Commission added 4 dB to the Grade A column to raise the desired level of service from 50% of locations to 70% of locations.

populated Grade A service area would use. However, the choice of zero dB of gain is not consistent with the characteristics of outdoor rooftop antennas. In urban and suburban areas (including the Grade A service area), the presence of man-made noise means the signal intensity must be higher (68 dBu rather than 54 dBu) to overcome interference caused by such noise and thereby to produce a signal that satisfies the standard criterion for service. The planning factors make no adjustment for man-made noise in the Grade B (rural) service area. However, a 1977 review of the technical planning factors, in a document released by the Office of the Chief Engineer of the Commission, stated that:

Large population shifts, from cities to suburban areas, in many parts of the country, cause the Grade B contours in these areas to no longer lie in "rural" areas. The assumption of 0 db to overcome rural noise in these "rural areas" is probably no longer valid because of the increased number of high voltage lines and motor vehicle traffic volume.⁹

As discussed above, having established the values of signal intensity required for Grade A and B service, one can then predict the approximate size of a station's service area (coverage) for various combinations of antenna height and power.

3.0 THE FIELD STRENGTH VALUES ASSOCIATED WITH THE GRADE B CONTOUR OR GRADE B SERVICE WERE NOT INTENDED TO BE AND ARE NOT A RELIABLE INDICATOR OF SERVICE AT ANY GIVEN HOUSEHOLD.

The field strength values associated with Grade B service are not a reliable indicator of service at any particular household and were never intended by the FCC to indicate such service. Rather, the field strength values associated with Grade A and B contours and service areas were essentially broad planning concepts, useful primarily in estimating the overall reach

⁹Research & Standards Division, Office of Chief Engineer, Federal Communications Commission, "A Review of the Technical Planning Factors for VHF Television Service," FCC/OCE RS 77 01, March 1, 1977, page 11.

or coverage of a broadcast signal.¹⁰ It is essential to recognize that the field strength values are median values. Moreover, the contours and associated field strengths assume no interference from other television stations (i.e., co-channel or adjacent channel interference). In practice, however, these phenomena are common. As Rule 73.683(b) points out, "the actual extent of service will usually be less than indicated by these estimates due to interference from other stations." Nor do the field strength values take into account multipath interference, or ghosting, which can significantly impair the quality of a broadcast signal. Multipath interference, which is quite common, arises due to reflections of broadcast signals from buildings, metal objects, hills and even flat ground. These reflections mean that a broadcast signal can follow different paths before arriving at a receiver. For example, one portion of a broadcast signal may travel in a straight line from the transmitter to a receiver. Another portion of the signal may be reflected by an overflying aircraft and arrive at that same receiver from a different direction delayed in time because of the longer path. Multiple delayed signals can give rise to ghosting: that is, the appearance of second ghost-like images on a television screen. A viewer may also receive two different pictures simultaneously from two different stations operating on the same television channel. The screen may show multiple distorted

¹⁰ Indeed, the Commission's rules expressly limit the applicability of the field strength contours in Rule 73.683, as follows:

The field strength contours will be considered for the following purposes only:

- (1) In the estimation of coverage resulting from the selection of a particular transmitter site by an applicant for a TV station.
- (2) In connection with problems of coverage arising out of application of [multiple ownership rules].
- (3) In determining compliance with § 73.685(a) concerning the minimum signal field strength to be provided over the principal community to be served.

47 C.F.R. § 73.683(c).

images. In that case, even if the preferred signal is above 47 dBu, the viewer is not getting an acceptable picture.

4.0 THE INCLUSION OF THE PHRASE, "CANNOT RECEIVE ... THROUGH THE USE OF A CONVENTIONAL OUTDOOR ROOFTOP ANTENNA," SUGGESTS THAT A HOUSEHOLD THAT CANNOT ACTUALLY RECEIVE AN ACCEPTABLE PICTURE IS UNSERVED UNDER THE ACT.

As noted above, the required field strength for a Grade B contour, set forth in Rule 73.683(a) represents a specific value of ambient median field strength existing 30 feet above the ground produced by a broadcast transmitter. Its existence has nothing to do with the presence or absence of a conventional rooftop antenna.¹¹ The inclusion of the concept of a conventional rooftop antenna suggests that a household be able to receive an acceptable picture and not merely be situated in or near an electromagnetic field of a given strength. If the test for service is merely the presence or absence of a signal of a certain intensity at, above, or in the general vicinity of a household, then the reference to a conventional rooftop antenna serves no purpose. The inclusion of this reference to a conventional rooftop antenna by Congress strongly suggests that the statute intended that an evaluation of service must do more than simply examine the ambient median field strength. Such measurement does not account for multipath interference, adjacent or co-channel interference, noise, diurnal or seasonal variations or other factors. One must correlate the technical data with the evidence that the signal measured is or is not usable and reliable before drawing a conclusion.¹²

¹¹ To be sure, in establishing the field strength values, the Commission made certain assumptions about the nature of viewers' antennas. As noted above, the Commission assumed that rural viewers would have a rooftop antenna and that urban/suburban viewers would not necessarily have one.

¹² Beyond the ambiguity inherent in the term "signal of grade B intensity," the Act's eligibility standard gives rise to several additional uncertainties. For example, the qualifier "conventional" gives no definite indication of what sort of receive antenna Congress had in mind. Performance of home antennas varies across a wide range, with a major impact on the strength and quality of signals a household can receive. Additionally, performance of these
(continued...)

5.0 THE FIELD STRENGTH VALUES ASSOCIATED WITH "GRADE B" SERVICE ARE APPLICABLE, IF AT ALL, ONLY IN RURAL, OUTLYING, OR FRINGE AREAS AND HAVE NO RELEVANCE TO AREAS WITHIN THE GRADE A CONTOUR.

In instances when it is found useful to employ Grade A and B service concepts, it should be kept in mind that the distinction between the two service areas is appreciable. A median signal of, for example, 52 dBu might provide an acceptable picture in a Grade B (rural) service area. That same field strength is unacceptably low in a Grade A (urban/suburban) service area or in urban or suburban areas within the Grade B contour which contain significant man-made noise. To the extent that the field strength values associated with the Grade B contour are relevant to eligibility under the Act, such values can have no applicability within Grade A service areas or other areas with significant man-made noise.

6.0 THE FIELD STRENGTH MEASUREMENT PROCEDURE SET FORTH IN THE COMMISSION'S RULES AND THE PROCEDURE USED BY DU TREIL ARE INADEQUATE FOR A DETERMINATION OF SERVICE UNDER THE ACT.

The FCC, in section 73.686 of its rules and regulations, calls for measurements either along radials drawn from a station's transmitting location, or at intersections of a grid drawn over the relevant community. Measurements are to be taken over a horizontal run of 100 feet, if feasible, or in clusters, with the measurement antenna elevated 30 feet above the ground. This methodology is designed to produce unbiased data indicative of a station's signal coverage over broad areas. Louis Robert du Treil, Jr. in an Expert Report submitted in this case adapted this methodology in order to determine eligibility of households under the SHVA.

¹² (...continued)

antennas need not correlate with their price. As a second example, antenna orientation has a great impact on reception of a signal, yet the Act does not prescribe how they should be oriented for eligibility purposes. Householders might make a reasonable decision to orient the antenna in order to "compromise" reception of two or more stations with transmitters situated in different locations. Such a compromise would diminish the reception of each signal in question, yet the Act offers no guidance regarding treatment of this type of tradeoff.

The du Treil report describes a procedure whereby measurements were taken in the vicinity of selected households at antenna heights of 30 or 20 feet. du Treil does not explain how the selective adaptation of techniques designed to deal with questions of propagation and general coverage are appropriate for disputes over reception at individual locations.

The Act does not provide any guidelines for how to measure its eligibility standard and does not point to any authority on how to conduct such a measurement. To my knowledge, the FCC has not been asked to develop any such guidelines.

In my opinion, the established TV field strength measurement procedures in FCC Rule 73.686 were not intended to evaluate the particular television reception of any given household. Moreover, the du Treil adaptation, as conceived in his report, would not in my opinion yield an accurate determination of a particular household's television reception. In its licensing process the Commission examines a broadcast station application to determine if the station's predicted city grade contour (equal to Grade A value plus 6 dBu) will cover its community of license, and if the proposed facilities comply with regulations on power, height, and spacing. It is taken for granted that the actual coverage will depart from predicted service to a greater or lesser degree, that some households outside the predicted service areas will receive acceptable pictures, that some households inside predicted service areas will not receive acceptable picture and the quality of service will vary throughout the service areas.

In considering applications for licenses and permits, questions will occasionally arise as to whether a station's coverage in a particular area is significantly better or worse than predicted. For example, if a station proposes to move its transmitter to a new location, opponents may argue that the move may deprive an area, perhaps a small community, of its only network television service. In turn, the station may argue that local conditions are such that its actual coverage is better than predicted and that the small community will retain its

service in spite of the transmitter move. The parties may then resort to actual field strength measurements to resolve the issue. The accepted measurement procedures are defined to produce sufficient unbiased data that will allow the Commission confidently to decide whether a given area does or does not receive the disputed service. To my knowledge, the Commission has never examined the question of whether a particular household does or does not receive television service, has never approved a procedure for making such a determination and would have no use for such information.

It is important to recognize that, as described above, the values for the Grade A and B contours are median values and represent the average of many values over a long period of time. Measurements of the signal intensity along a 100-foot path 30 feet above the ground, cluster measurement taken at and around a point 30 feet above the ground, or measurements made at some alternative height, are all essentially one-time samples. They are indicative of the characteristics of the signal available in the immediate area of the measurement at the time ~~taken and, when combined with other samples, indicative of the general service provided by~~ the station. However, the one-time measurement of a signal in the vicinity of a household, as contemplated by the du Treil adaptation, does not permit one to conclude that the household will receive an acceptable picture 90% of the time using a conventional outdoor rooftop antenna. To determine what the actual median field strength is at a location requires repeated measurements over a long period of time. Further, measurements must be validated by actual observation of the television picture received at the household. Single, one-time, unvalidated measurements are inconclusive.

/s/

William H. Hassinger

Dated: March 31, 1997

Broadcast Television Signal Strength, Grade of Service and Picture Quality

W. Russell Neuman

Harvard University, Massachusetts Institute of Technology

Shawn O'Donnell

Massachusetts Institute of Technology

December 10, 1996

The relationships among broadcast television signal strength, grade of service and observed picture quality are dependent on factors left out of discussions in Federal regulations using signal strength as a criterion. In this memo we discuss the relationship between signal strength and picture quality, consider some of the factors that complicate the relationship, and suggest more refined means for determining picture quality than electric field strength at reception sites.

1. An Empirical Study of the Signal Strength/Picture Quality Relationship

The engineering firm of Cohen, Dippell and Everist, PC, of Washington, DC conducted field measurements of broadcast television signal strength in and around Pittsburgh, Pennsylvania during the period November 13-16, 1996. In addition to the field strength measurements, Cohen, Dippell and Everist's engineers videotaped signals received with a conventional log-periodic dipole array antenna at 30 feet. We subjected the videotaped signal samples to CCIR Impairment Scale evaluations to evaluate picture quality. We then plotted the relationship between signal strength and picture quality. At the sites surveyed, there was no correlation between signal strength and picture quality.

1.1 Field Measurements

Cohen, Dippell and Everist employed standard practices, as defined by the Federal Communications Commission, to measure field strengths (see CFR 47 §73.686 for details.) The engineers visited 15 different sites in the Pittsburgh area. At each site, the engineers measured the signal strengths for a VHF station (WTAE, Channel 4) and a UHF station (WPGH, Channel 53.) Cohen, Dippell and Everist's engineers noted the Grade of service as defined by the signal strength level. The engineers then recorded a few minutes of programming at each of the locations.

In addition to downtown Pittsburgh, the engineers took measurements at several locations in Greensburg and Washington, Pennsylvania. Greensburg is East-South-East of Pittsburgh, Washington is South-West. Both are approximately 25

miles from downtown Pittsburgh. As can be seen in the following section, both towns are well inside the predicted Grade A contours for both WTAE and WPGH.

1.2 Profile of Stations analyzed

WTAE, Channel 4

WTAE, Channel 4, is an ABC affiliate broadcasting from a transmitter in Elizabeth Township, approximately 15 miles Southeast of downtown Pittsburgh. WTAE broadcasts a 100 kW video signal from an antenna 1062 feet above ground, 965 feet above average terrain. The predicted Grade A and Grade B contours, as illustrated in the Television & Cable Factbook, are shown in Figure 1.¹ The triangle in the diagram marks the location of the broadcast tower.

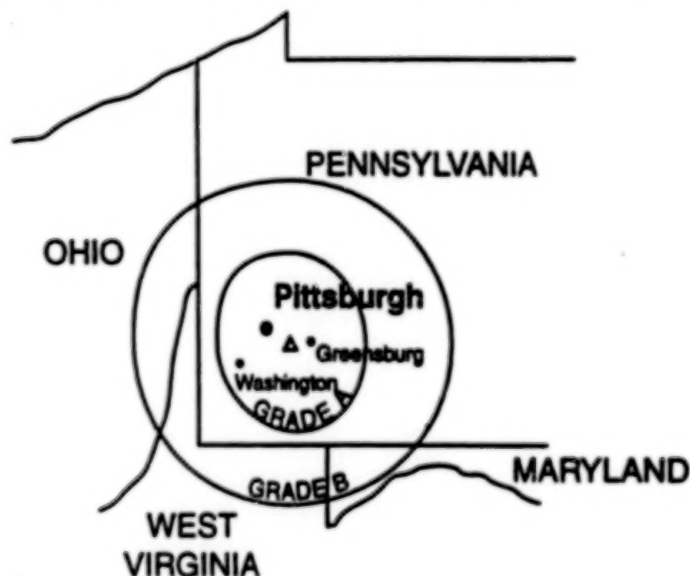


Figure 1. Predicted A and B contours for WTAE (ABC), Pittsburgh

The Grade A contour for Channel 4 covers most of Southwestern Pennsylvania; the B contour reaches Ohio, West Virginia, and the Maryland panhandle.

WPGH, Channel 53

WPGH, Channel 53, is a Fox affiliate. WPGH broadcasts from studios and an antenna atop the hills just North of downtown Pittsburgh. The station is authorized to transmit a 2340 kW video signal; its antenna is 736 feet above ground, 1010 feet above average terrain. Figure 2 shows the predicted Grade A and Grade B contours for WPGH. Both the predicted Grade A and Grade B contours for WPGH reach as far as West Virginia and Ohio.

¹Television & Cable Factbook, v.64 (Washington, DC: Television Digest Inc., 1996)

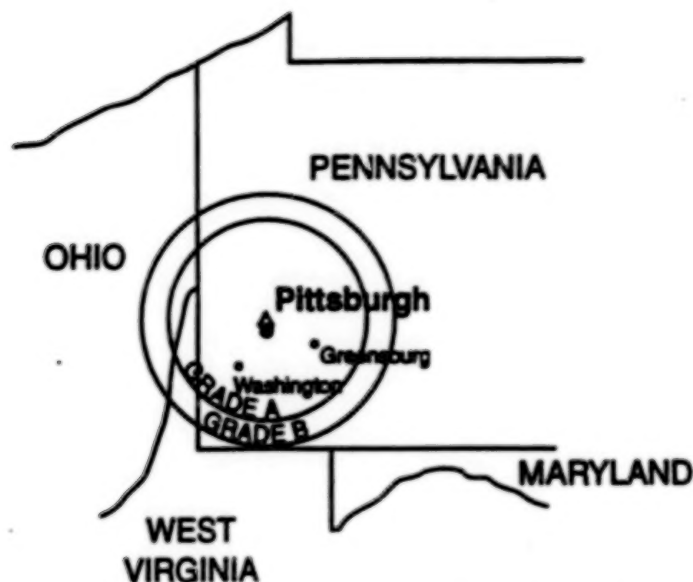


Figure 2. Predicted A and B contours for WPGH (FOX), Pittsburgh.

1.3 Picture Quality Assessment

In the picture quality assessment, we used the CCIR-recommended impairment scale.² The values and labels for the scale are as follows:

Rating	Description
5	Imperceptible (no impairments)
4	Perceptible, but not annoying
3	Slightly annoying
2	Annoying
1	Very Annoying

Any value between 1 and 5 is permitted; often the scale is presented as a number line on which the evaluator places an X on the line where it seems most appropriate.

These ratings are personal—different individuals may find different amounts of interference and noise to be annoying; In the evaluation presented below, the visual picture characteristics associated with each rating were as follows:

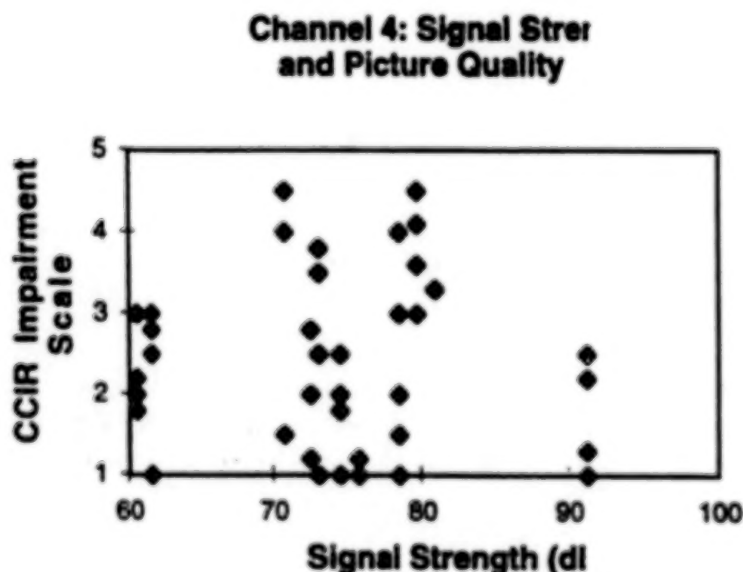
²This scale and alternatives are presented in John Allnatt, *Transmitted-Picture Assessment*. (New York: John Wiley & Sons, 1983)

Rating	Typical Image Characteristics
5	No impairments
4	One light ghost or light noise; on screen text legible
3	Several ghosts or moderate noise; on-screen text becoming difficult to read
2	Several strong ghosts; small details lost; all but largest text illegible
1	Synch problems caused by strong multipath; lost color or very strong noise.

1.4 Results

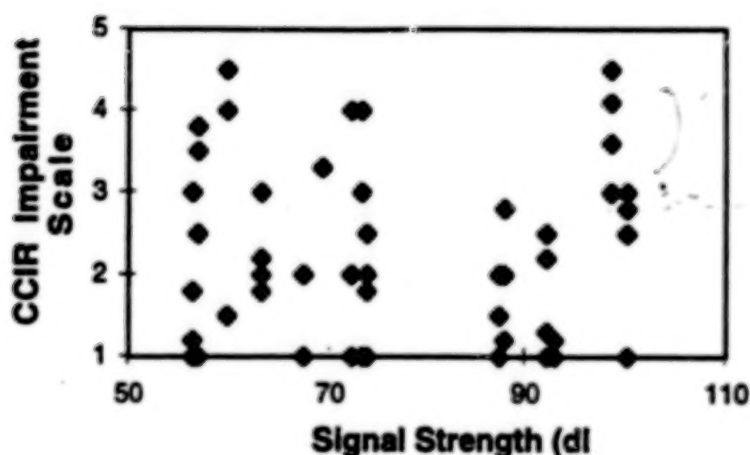
There is no correlation between signal strength and picture quality in the samples analyzed. In some locations in the City Contour (≥ 6 dBu above Grade A,) the video signal is not viewable, while some measured B-Grade locations provide near-perfect pictures.

The following scatter chart illustrates the lack of relationship between electric field strength as measured in dBu and evaluations of the image viewed. Note that for Channel 4, any field strength above 68 dBu is considered Grade A service.



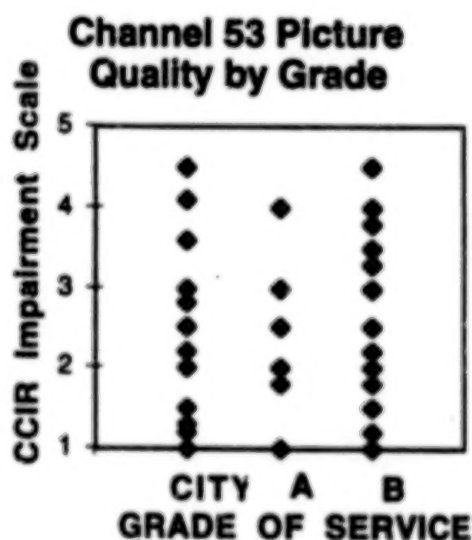
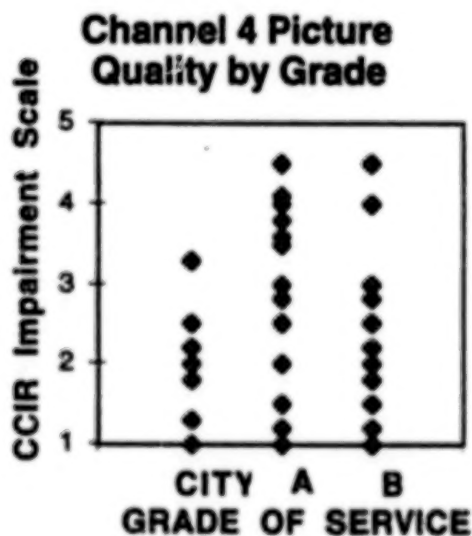
The relationship between signal strength and image quality is even more variable for the UHF station, WPGH. Note that for Channel 53, any field strength above 74 dBu is considered Grade A service.

Channel 53 Signal Strength and Picture Quality



Recall that all of the locations visited by the field engineers were inside the *predicted* Grade A contour. The *measured* signal strength fell below the Grade A standard in many locations. Note that for Channel 53, any field strength above 74 dBu is considered Grade A service.

As measured by Grade of service, signal strength appears to be equally uncorrelated with picture quality:



2. Topography as a Factor in Signal Strength and Picture Quality

Topography makes a big difference in signal strength. At VHF and UHF frequencies, signal strength drops rapidly as a receiver descends behind a hill. In the examples below, it is assumed that the signal strength on the front of the hill is no greater than 3 dB above the minimum for Grade B service. (As we discuss

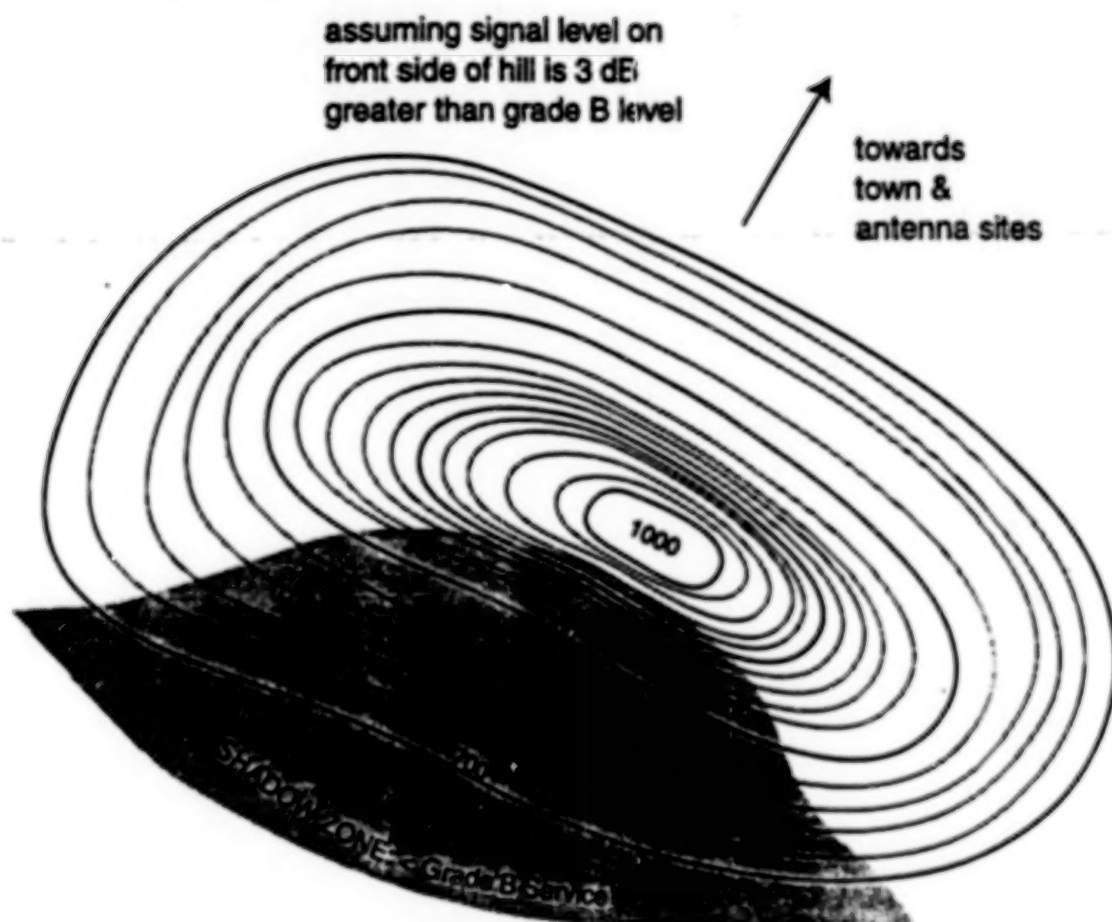
below, this includes a large portion of the Grade B service area.) For the major network stations in Pittsburgh, Channels 2, 4 and 11, signal strength drops below Grade B service at 100, 80 and 60 feet below the crest of a hill, respectively. This includes a 30' antenna, so that the receiving location is 60 feet from the crest of the hill the antenna is 30 feet from the crest.

channel	= center frequency	Grade B lost at elevation
2	57 MHz	- 100 feet
4	69 MHz	- 80 feet
11	201 MHz	- 60 feet

The shadow losses represented in the following diagrams are based on nomographs in the *Television Engineering Handbook*; more accurate predictions of the magnitude of signal loss would require substantially more complicated models. The propagation models should be verified with field measurements such as those presented in the previous section.

2.1 Hypothetical Signal Strength Map for a Hill Near Pittsburgh

The following figure illustrates a relief map for a modest hill somewhere South-West of Pittsburgh. Assuming that the signal strength on the front of the hill is within 3 dB of the Grade B minimum, most of the back of the hill will not receive Grade B signals.

Channel 4, WTAE (ABC)**2.2 A large amount of the B-contour area is near the threshold**

The models of propagation presented here assume that the signal strength on the front-side of the hill is within 3 dB of the minimum Grade B signal. Depending on the antenna configuration and the assumptions made in calculating predicted area, a large percentage of the Grade B area can be near the threshold.

If the broadcast signal is assumed to fall off at rates that can be calculated for a flat earth,³ fully one half of the area inside the B-contour is within 3 dB of the minimum signal strength.

In practice, a broadcast signal drops off faster than inversely with the square of distance from the broadcast antenna. This means that the portion of the B

³Television Engineering Handbook: Featuring HDTV Systems. K. Blair Benson, editor. Revised by Jerry C. Whitaker. New York: McGraw-Hill, Inc. 1992

contour within 3 dB of the threshold will amount to somewhat less than half of the entire B area (which includes the Grade A area.)

2.3 Multipath as a Confounding Factor in the Signal Strength/Picture Quality relationship.

As the Pittsburgh data shows, there is no correlation between signal strength and picture quality that holds for all places and all times. Indeed, the purported correlation might hold only under ideal situations. The contingent nature of the relation between signal strength and picture quality makes it an inappropriate indicator of unserved households for the purposes of determining eligibility for satellite delivery of network affiliate broadcasts.

One factor standing preventing signal strength from serving as an adequate surrogate for picture quality is problem of multipath transmissions. Multipath is the phenomenon whereby signals originating from the transmitter arrive at the receiver after having traveled more than one path.

Consider the following example of multipath: at a site on the side of a hill opposite a television transmission tower, signals arrive via refraction around the edge of the hill and reflection from a nearby building downwind from the site. The signal reflected from the building adds to the refraction path signal to yield an electric field above the Grade B minimum. The measured field strength on the far-side of the hill is above the Grade B threshold, but the viewed image includes both the weakened and refracted 'direct' path signal as well as the reflected signal. The result on the viewer's screen could be anything from a faint ghost to a signal with no horizontal synch.

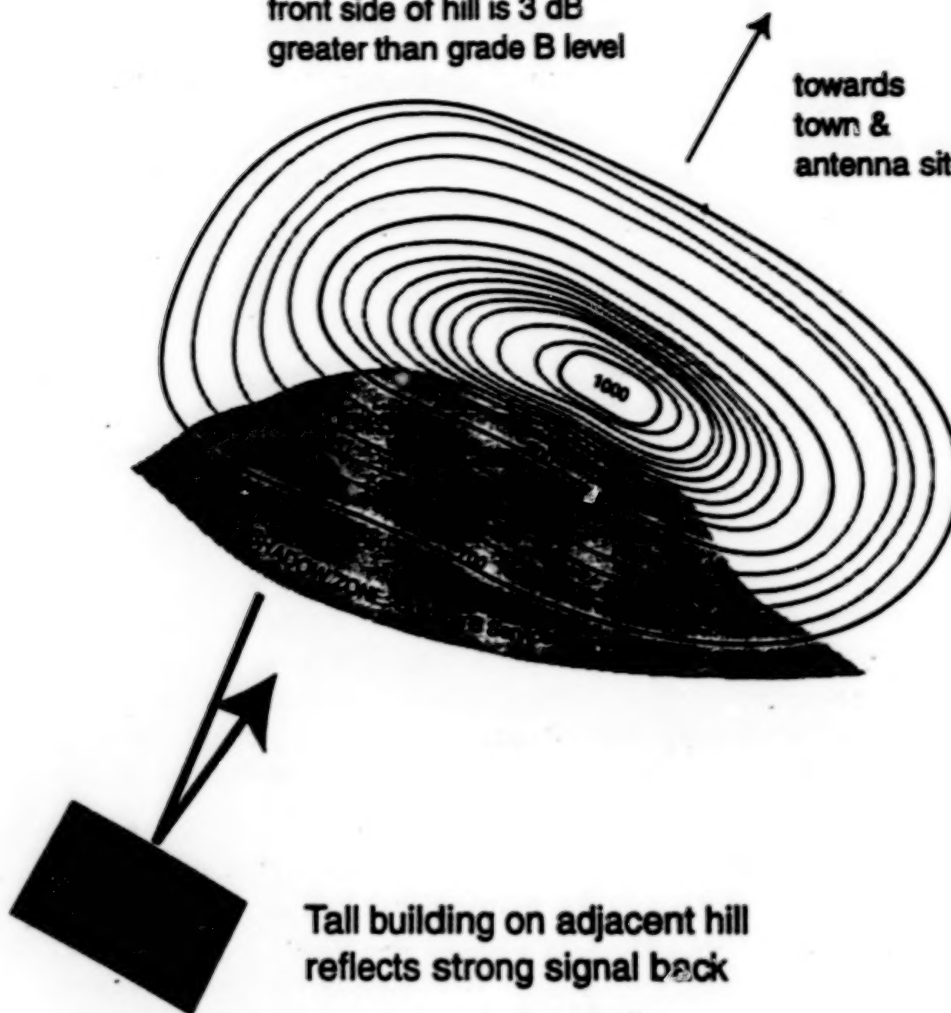
An interesting factor is that, at 200 MHz, the features on a building (like windows) are on the order of a wavelength in size; depending on construction materials, the building can act as a giant phased array to reflect energy out in random directions.

For every 1 mile of additional distance that the reflected signal has to travel, the ghost moves across about 8% of the width of the screen.

Channel 11 with multipath

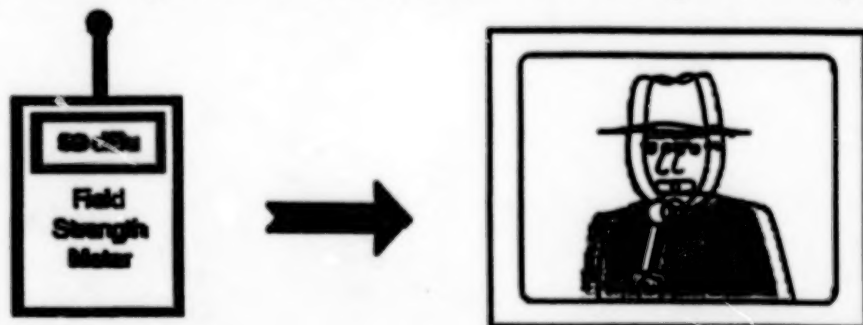
assuming signal level on
front side of hill is 3 dB
greater than grade B level

towards
town &
antenna sites



Tall building on adjacent hill
reflects strong signal back

The result of the reflection is that one could obtain an electric field measurement greater than the minimum required for Grade B service (56 dBu for channel 11,) though the signal quality will be terrible. For example, a strong reflection coming from a building about a quarter mile away might yield a Grade B signal with a few dBu to spare. But the viewer could see a strong, half-mile ghost:



3. Conclusions and a Proposal

In Section 1 of this report, we show that

- the observed signal strength in an arbitrary location can vary significantly from the predicted signal strength.
- there is either no correlation (or a very contingent correlation) between signal strength and picture quality.

In Section 2, we saw that

- topographical features can be used to predict signal strength

An implication of the findings in this report is that it is possible to construct a computational model for predicting signal strength that takes as its parameters a topographical map of an area, information about electromagnetic propagation, and empirical measurements. With additional work the model could also forecast the likelihood of impairments that are not related to weak signal strength.

For example, the forecasting model could generate, for an arbitrary location, the signal strengths from remote television stations. The model would estimate the likelihood that a receiver at that location would be able to receive a signal strength greater than the minimum Grade B signal, and it could also suggest whether or not the picture quality would be acceptable to the average consumer.

The building blocks for such a model are available off-the-shelf. Topographical data for this type of model do not require the resolution typical in military applications—the model needs to know about hills and large structures, only. Low-resolution satellite surveying data would be entirely appropriate for this type of application. The propagation models necessary for the television reception model could be adapted from models developed for radio services such as cellular telephony.

The amount of work necessary to implement such a model is therefore much less than it would be if the goal was to start from scratch and collect topographical information and design algorithms for forecasting the propagation of VHF and UHF signals. Some fine tuning of the existing models would be necessary given the characteristics of NTSC signals, but most of the work has been done already.

NewsChannel 5

WTVF

July 5, 1995

RECEIVED
7/10/95

Mr. Roy Levi
Director of Compliance
Prime Time 24
153 East 53rd Street
59th Floor
New York, NY 10022

Dear Mr. Levi:

I understand that you intend to conduct "site measurements" of the strength of the signal of Station WTVF, Nashville, Tennessee. You further claim that we will be responsible for the costs of measuring any household that you determine is not an "unserved household". Your claim that we would be responsible for any costs of measurement are incorrect, and any signal measurements taken by Prime Time 24 now would be premature.

There is no standard by which it could be determined that a household is "unserved" due to the continuing failure of the satellite carriers to cooperate in forgoing an appropriate industry agreement for a measurement standard. In a meeting with our affiliate associations in New York some months ago, representatives of Prime Time 24 agreed that consulting engineers engaged by the satellite carriers and by the affiliates associations and networks should cooperate in establishing a measurement standard. Although engineers retained by the affiliate associations and networks stand ready to work cooperatively with your engineers to establish a standard, consulting engineers retained by the satellite carriers have not agreed to meet or even discuss the matter with the affiliates' and networks' engineers. Until they do so and a standard is agreed upon, any measurements you take will be suspect and ~~unreliable~~.

We look forward to your full and timely cooperation with our affiliate and network representatives as they continue to attempt to implement the requirements of the Act. Please do not hesitate to contact me with any further signal measurement inquiries.

Sincerely,

Mark Binda

Mark Binda
Program Director, WTVF

474 James Robertson Parkway • Nashville, Tennessee 37219 • (615) 244-5000

Landmark Communications, Inc.

© A CBS AFFILIATE

RECEIVED
6/25

June 23, 1995

Mr. Roy Levi
Director of Compliance
Prime Time 24
153 East 53rd Street
New York, New York 10022

Re: Station KSAT-TV, San Antonio, Texas

Dear Mr. Levi:

Jim Joslyn has passed on to me your letter of May 17, 1995, in which you claim that you intend to conduct "site measurements" of the strength of the signal of Station KSAT-TV, San Antonio, Texas. You further claim that Post-Newsweek will be responsible for the costs of measuring any household that you determine is not an "unserved household." Your claim that Post-Newsweek would be responsible for any costs of measurement are incorrect, and any signal measurements taken by Prime Time 24 now would be premature.

First, there now is no standard by which it could be determined that a household is "unserved" due to the continuing failure of the satellite carriers to cooperate in forging an appropriate industry agreement for a measurement standard. In a meeting with our affiliate associations in New York some months ago, representatives of Prime Time 24 agreed that consulting engineers engaged by the satellite carriers and by the affiliates associations and networks should cooperate in establishing a measurement standard. Although engineers retained by the affiliate associations and networks stand ready to work cooperatively with your engineers to establish a standard, consulting engineers retained by the satellite carriers have not agreed to meet or even discuss the matter with the affiliates' and networks' engineers. Until they do so and a standard is agreed upon, any measurements you take will be suspect and unreliable. I would recommend that you encourage your engineers to meet and resolve a standard. Until that time, you should not attempt to charge us for your measurements.

Second, if you insist upon taking measurements in an attempt to charge the cost of such measurements to Post-Newsweek, be assured that we will begin taking measurements in San Antonio and other markets in which Post-Newsweek stations have challenged Prime Time 24 subscribers. Our engineers will comply with the measurement standards established by the FCC in the must-carry context, which, in the absence of an agreement to the contrary, is the only available standard. We will begin measuring those subscribers in sight of our transmitters and in our Grade A contours that you have refused to terminate even though they clearly are not unserved households. The costs of taking these measurements will be "forwarded to your attention."

Mr. Roy Levi
June 23, 1995
Page 2

We look forward to your full and timely cooperation with our affiliate and network representatives as they continue to attempt to implement the requirements of the Act. Please do not hesitate to contact me with any further signal measurement inquiries.

Very truly yours,

Robert E. Branson

Robert E. Branson, Esq.
Vice President
Chief Legal Counsel

cc: James H. Joslyn
Fred Lomax

RICK BOUCHER
9TH DISTRICT, VIRGINIA

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SUBCOMMITTEE

TELECOMMUNICATIONS AND BROADCASTING
SPEECH AND HEARING

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CRIMINAL JUSTICE AND PUBLIC SAFETY

ASSISTANT CLERK



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House of Representatives

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February 11, 1997

Mr. Joe Macione, Jr.
WCYB
101 Lee Street
Bristol, Virginia 24201

Dear Joe:

Thank you for your thoughtful and comprehensive letter of January 23, 1997, concerning the Section 119 Satellite license and the range of concerns which are currently being voiced by various interested parties concerning its implementation.

At the outset, let me clearly state that it is my perception that both broadcasters and satellite carriers are in agreement that the "white area" balance which we struck in 1988 was proper. In other words, the parties are in agreement that television viewers who can receive the network programming from a local affiliate of the network should receive their programming from that local affiliate. Those viewers who cannot receive the network affiliated programming from a local affiliate ("white area" residents) will be eligible to subscribe to satellite delivery of the network programming. That balance assures the integrity of the market for local broadcast stations and simultaneously assures that television viewers who cannot receive the programming from the local station will be eligible to receive it by means of satellite delivery. As one of the principal architects of the 1988 legislation, I assure you that I strongly subscribe to that balance as well, and I do not dispute in any fashion the appropriateness of local broadcast stations having the right to protect the integrity of their markets.

Problems have arisen in the implementation of the 1988 legislation. At the present time, it is beyond dispute that some viewers who can receive a perfectly adequate signal from the local television station are receiving the network programming by means of satellite delivery. That practice is contrary to the provisions of the 1988 Act and to the important balance of the rights of the parties which that Act established.

At the same time, it is apparent that many local broadcast stations upon receiving the list of viewers in their area who subscribe to network programming via the satellite have the practice of challenging all of the satellite subscribers who lie within that station's Grade B contour. Obviously, particularly in mountainous areas, this practice results in large numbers of people who cannot receive the programming by means of the local station also being disqualified from receiving it over the satellite. That result is also contrary to the balance established in the 1988 legislation.

Moreover, there is a third category of concern. I am told that approximately 20 percent of the viewers who can receive at the rooftop a signal of Grade B intensity from the local station and are, therefore, terminated from receiving satellite service, cannot receive a viewable picture on their television set. These individuals are using rooftop antennas and still cannot receive a viewable picture. The problem is that in mountainous regions ghosting and shadows are caused by electronic echoes of the station's signal from the mountains. The echoes result in different versions of the station's signal arriving at different time intervals at the antenna. This is a genuine problem which I believe all interested parties acknowledge. I suggest that to address this concern, a picture quality standard be substituted for the Grade B intensity standard.

In your letter, you suggest that the use of a picture quality standard would not be appropriate because people with worn-out television sets and others who use rabbit ears would be able to subscribe to a satellite delivered service simply on the basis that their worn-out sets or rabbit ears were not adequate to receive a quality picture from the local station. I understand the point you are making, and I would suggest that in whatever version of legislation we draft to address this acknowledged problem that the standard be a viewable picture accessible by a rooftop antenna with a properly functioning television set. It is not the intent of those who are concerned about inadequate picture quality to open the door to permit satellite delivery of the signal simply because a good signal cannot be received on a worn-out set or with rabbit ears. I do not believe that it is the intent of the satellite carriers who have expressed this concern, as have thousands of viewers, to find some clever way to upset the balance of the 1988 Act. The goal is to assure that stations protect the integrity of their market and that viewers be able to get good delivery of network programming, preferably from the local station, but if that is not possible, from the satellite.

The test that I have outlined above would also seem to make sense in terms of what I understand to be the current practice of testing specific sites for signals of Grade B intensity. I am told that at the present time the test occurs by a truck going to the viewer's residence, raising an antenna attached to the truck to the level of the rooftop, and determining whether a signal of Grade B intensity is received on a meter inside the truck attached to the truck-mounted antenna. If we could agree on an acceptable picture quality standard, it would then be a simple step for the technician to attach the lead from the antenna mounted on his truck to a television set in the truck to determine whether a picture of the minimum acceptable quality is being received. We could easily structure legislation which embodies this concept.

Joe, my goal is not to advance the concerns of any single interested party but to achieve a workable reform of the Section 119 license which would for the first time in a decade creates peace among all of the parties. In summary, we should find a means of ending the practice of people who can receive strong local signals with adequate picture quality receiving those signals from the satellite. The broadcasters' legitimate interest in protecting the integrity of their markets requires this result. At the same time, we must take into consideration the concerns of those viewers who do not receive a signal of Grade B intensity and who are being challenged simply because they reside within a local station's Grade B contour, and we must take into consideration the concerns of those residents who do get a signal of Grade B intensity but simply don't get a picture they can watch.

I will stress again that all of these are equally legitimate interests, and all of them must receive equal consideration and be resolved through our efforts. This will not be an easy task, but if people of good will are willing to devote themselves to it, I am confident that the result can be achieved. I should also mention that my suggestion that consideration be given to the TASO scale was a suggestion only. If there is another means of measuring picture quality which is more reliable than TASO, I would invite you to propose it. Perhaps we need to create our own standard of picture quality to address this circumstance.

Finally, I would make the point that the best means of resolving these implementation issues is through agreement of the interested parties in advance of the legislative debate. If there is a genuine desire on the part of both broadcasters and satellite carriers to address and resolve these three concerns, I am confident that a resolution can be achieved.

February 11, 1997

Page 4

Jon, I hope that in this letter I have clearly defined for you my areas of concern and present goals. I invite our further discussion on this matter as well as on the broader range of issues in which we have a common interest.

With kind personal regards and best wishes, I remain

Sincerely,

A handwritten signature in dark ink, appearing to read "R. Boucher". The signature is written in a cursive, somewhat stylized font.

Rick Boucher
Member of Congress

[illegible]

0200 224-5001

PROPERTY OF THE
ARMY

Wade H. Hargrove, Esq.
Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P.
Post Office Box 1809
Raleigh, N.C. 27602

Following up on our meeting of September 13, 1993, to discuss the implementation of the 1994 amendments to the Satellite Home Viewer Act, I continue to be concerned about the effects of disputes within the industry, on innocent consumers. To that end, I would appreciate an update on the status of negotiations to achieve an industry agreement, and on efforts by the satellite distributors to afford challenged consumers an opportunity to protect the termination of their service to newest affiliates before termination is effectuated. In addition, I would like information on some particular issues of concern that have come to our attention.

It is our understanding that one of the issues that has been the subject of discussion for possible inclusion in an industry agreement is picture clarity, specifically, whether a household that receives an acceptable Grade B intensity signal, but receives poor picture quality, should be entitled to service. From a consumer perspective, picture quality is the key issue, and it is little comfort for a viewer who theoretically should receive a reliable signal if in fact that viewer's picture is plagued by ghosting, or other significant quality problems. This matter certainly seems appropriate for resolution as part of the industry agreement. If such an outcome is unlikely, we may be compelled to address the issue legislatively to ensure adequate protection of consumer interests.

Another issue related to picture quality is the size and cost of the antennas a household must have before there can be a determination that it is unserved. The statute speaks of a "conventional outdoor rooftop receiving antenna," yet I am informed that some subscribers have been told they must purchase expensive and elaborate antennas in an effort to receive their local network affiliates. I believe that the industry should be able to establish a consensus as to the meaning of a "conventional" rooftop antenna, including general technical specifications and cost guidelines.

Wade H. Hargrove, Esq.

Page 2

January 3, 1996

I am also concerned to hear that the satellite distributors may have charged some challenged households for testing signal strength. Please advise me as to the basis for these charges and their frequency. This practice appears to impose a burden on the viewers, and I would be interested to know what prompted or recommended it.

Again, the interests of the consumer in this area are paramount; it has been three months since we met, and I am concerned to learn that the industry agreement still is not in place. I would appreciate a response to this request at your earliest convenience.

I hope the new year finds you in good health. I look forward to working with you in 1996.

Sincerely,



CARLOS J. MOORHEAD

Chairman

Subcommittee on Courts and
Intellectual Property

RICK BOUCHER
5TH DISTRICT VIRGINIA

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CRIMINAL JUSTICE, LAW ENFORCEMENT

AND PUBLIC SAFETY



Congress of the United States
House of Representatives

December 12, 1996

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Mr. Edward O. Fritts
President and CEO
National Association of Broadcasters
1771 N St., NW
Washington, D.C. 20036

Dear Eddie:

I applaud your efforts to sponsor the discussions between network affiliates and satellite carriers concerning the eligibility of consumers to receive network programming via satellite. I am hopeful that these discussions will lead to an agreement before contentious and costly litigation commences and before the dispute is brought to the Congress for resolution. In that spirit, I am offering these suggestions.

A properly balanced agreement must incorporate poor picture quality as a ground for receiving network programming via satellite. The Satellite Home Viewer Act (the "Act") currently provides that a consumer is ineligible to receive network signals via satellite if that consumer receives a strong, over-the-air signal (defined as a Grade B intensity signal when measured at the rooftop) from the local broadcaster. That test is no longer adequate and is in need of revision. Approximately twenty percent (20%) of consumers who have their satellite network signals terminated based on receiving a Grade B intensity signal at the rooftop do not receive a viewable picture due to "ghosting" or other interference problems. Shadows and ghosting commonly occur when signals reflected from mountains or other high structures cause echoes of the original signal to arrive at the viewer's antenna at different time intervals from the original signal. Objective demonstrations of this problem can be provided.

Consistent with the underlying intent of the Act, I have no doubt that Congress upon viewing these demonstrations would opt to support the eligibility of the satellite customers who have a Grade B strength signal at the rooftop but who do not receive viewable pictures. Therefore, it is essential that a picture quality standard be a part of any agreement which is reached. I urge you to incorporate the picture quality standard known as the Television Allocations Study Organization ("TASO") scale, into the agreement for determining a consumer's eligibility to receive network programming via satellite. The

Letter to Edward O. Frins
December 12, 1996
page 2

TASO scale, which was developed by the FCC, is the most effective objective measurement to assess picture quality concerns.

In practice, the person who is retained by the local broadcaster to perform the signal test would simply place the TASO card next to the viewer's set and determine whether the picture is as clear as the minimum TASO standard. Time and money would be saved because such a test could be performed by individuals with less training than engineers. The existing "loser pays" rule would continue to determine whether the cost of the person who performs the test would be borne by the affiliate or by the satellite carrier.

Eddie, I would also make the point that these discussions have little chance of succeeding if they are constrained by current law. The parties must be willing to go beyond the statute where necessary to create workable solutions. If all stakeholders are in support of an agreement that goes beyond current law, I am confident that the Congress will quickly pass any amendments to the Act necessary to give full legal effect to the agreement.

I appreciate your attention to these suggestions which are offered in the spirit of facilitating the conclusion of an agreement on this matter of importance to viewers and broadcasters alike. My staff and I stand ready to offer any assistance you may need either now as you seek to finalize an agreement or in the effort to enact statutory changes which will codify your agreement.

With kind personal regards and best wishes, I remain

Sincerely,

A handwritten signature in dark ink, appearing to read "Rick", written over a large, stylized capital letter "D".

Rick Boucher
Member of Congress

RB/mam

cc: Mr. Joe Macione
Mr. Bob Lee

Michael G. Oxley
4TH DISTRICT, OHIO

33 BAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-3504
(202) 727-2878

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Congress of the United States
House of Representatives
Washington, DC 20515-3504

October 29, 1996

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MANSFIELD, OH 44902
(419) 522-5757

TOLL FREE IN OHIO:
1-800-472-4154

Mr. David C. Lavalley
3490 Johnstown Road
Centerburg, OH 43011

Dear Mr. Lavalley:

Thank you for contacting me with your concerns regarding the Satellite Home Viewer Act. Access to satellite-delivered network programming is an important issue.

This is a complicated issue that demands a brief explanation. The Satellite Home Viewer Act contains a provision that requires satellite broadcasters to terminate service of network programming if there is a local network station that can provide "acceptable service." A local broadcaster can challenge the delivery of network programming by satellites through legal channels. If a broadcaster is able to provide network programming to a household, the satellite programmer can not. This stipulation is included in an effort to protect the copyrights of local broadcasters.

Unfortunately, this stipulation has become the basis of the controversy. There is some concern over how "acceptable service" is defined. Currently, broadcast signal strength is the main determining factor. However, strong signal strength does not necessarily equate with quality reception. Consumers have a legitimate argument that the quality of the signal rather than the strength of the signal alone should determine acceptable reception. This would seem to reflect the intention of the Act. Satellite broadcasters clearly would also like to see the definition altered to allow them to serve more customers.

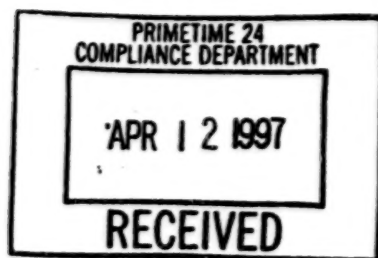
I believe that the Satellite Home Viewer Act was written to protect the interests of the consumer. The consumer must be ensured access to acceptable broadcast service. Given the opportunity to act on this issue legislatively, you may be assured that I will bear in mind your concerns.

Thank you for contacting me on this matter. If I may be of any further assistance, please feel free to contact me again. Due to the copyright element of this issue, it falls directly under the jurisdiction of the Copyright Office. They deal with this issue on a continuing basis. If you would like further information or details on this issue, please write or call the Library of Congress, Copyright Office, Department 17, Washington, D.C., 20540, (202) 707-8350.

Again, if I may be of any further assistance, please let me know.

Yours truly,

Michael G. Oxley, M.C.
Fourth Ohio District



DirectV
158852

Mr. Robert Guttlietp
Carctaker
1720 Deerfield Island Park
Deerfield Beach, FL 33441

Dear Mr. Guttlietp:

December 18, 1996

WFOR is pleased to provide you a temporary waiver for receiving CBS programming by means of Satellite until such time that there is a means of providing you a unusable signal from Channel 4.

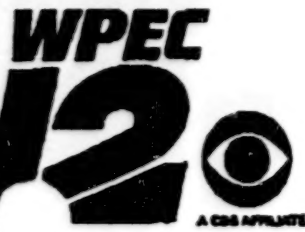
I appreciate the photos you sent. It has been my experience that the "pines" do not materially attenuate low band television frequencies. Some UHF frequencies are severely blocked by the true pines in the south. This is especially true in Houston, Texas. On the other hand, high rise buildings can create a problem in receiving television frequencies. This may be the problem you face. As you know, the WFOR transmitter and antenna is located at the Broward/Dade county line near Highway 441.

There is no doubt that you need access to local television ncws programs in the event of emergencies. A local news program from North Carolina can hardly provide up to the minute information that you may need. Therefore, I hope you will continue to look for a solution to the signal problem you have experienccd.

In the meantime, if you have lost your CBS programming, you should submit a copy of this letter along with a request for restoring your CBS programming to your programming provider.

Sincerely,

Jerry Birdwell
WFOR Consultant, Signal and Satellite Reception



Bill Peterson
Vice President & General Manager
Direct phone: 561-881-0727
E-mail: Peterson12@aol.com

Mailing address: P.O.Box 198512, West Palm Beach, FL 33419-8512. Phone 561/844-1212 • Fax 561/842-1212
Shipping address: 1100 Fairfield Dr., West Palm Beach, FL 33407

December 4, 1996

PrimeTime 24
153 East 53rd Street
59th Floor
New York, NY 10022



Dear Sir or Madam:

WPEC waives its challenge to the following Primetime 24 subscriber receiving CBS programming via satellite:

Mr. Roger Plouffe
718 Poinciana Street
Clewston, FL 33440

While we believe WPEC has a Grade B signal over his residence, we acknowledge it is close enough to the end of the Grade B pattern that isolated local obstructions may interfere with his reception. Mr. Plouffe reports he is within 600-yards of a dike system (around Lake Okeechobee), which may be the source of that interference.

Sincerely

Bill Peterson
Vice President & General Manager

Already Entered
DirectV
000162884

cc: Mr. Roger Plouffe
718 Poinciana Street
Clewston, FL 33440

"The 1-2 Turn To"



RECEIVED
R 11 D

November 22, 1995

Primetime 24
Mr. Roy Levi
153 East 53rd Street
59th Floor
New York, N.Y. 10022

re: Ron Anderson
23588 S. Hwy. 211
Colton, OR 97017

Dear Mr. Levi:

The above addressee has demonstrated to our satisfaction, that due to local obstructions, they are unable to receive KGW or one of its translators directly off the air with acceptable quality. Therefore, we are granting a waiver to this addressee to allow Netlink to continue to provide NBC service.

If you have any questions, please give me a call.

Sincerely,

Eric Dausman,
Director of Operations & Engineering
(503) 226-5004 Direct Line
(503) 226-4577 FAX



330 Market Street, Philadelphia, PA 19106-2796
(215) 925-2929 Fax (215) 925-2420

June 20, 1995

REC'D
6/27/95
D

W. M. VOR

Ms. Karen S. Flatley
PrimeTime 24
153 East 53rd St.
59th Floor
New York, NY 10022

Dear Ms. Flatley:

In response to your letter of May 23, 1995 in reference to the termination of some of your subscribers, we find that an error has been made with our challenges. The last four subscribers on your list were not challenged by us. Therefore, we ask that you reconnect the following subscribers:

✓RR 1 Box 435A	Bernville	PA	19506
✓RR 4 Box 4092	Birdsboro	PA	19508
✓140 Pineland Rd.	Birdsboro	PA	19508
✓64 Kennel Rd.	Birdsboro	PA	19508

Also, the following subscribers were challenged by us, but because of their geographic location, the terrain gives them a legitimate reason for not taking our signal off air. Please reconnect the following subscribers:

✓28 Fireside Lane	Levittown	PA	19055
✓893 Shaner Drive	Pottstown	PA	19464

If you have any questions or problems, please contact us.

A Paramount Communications Company



August 21, 1996

Joseph Volosky
10500 Rt. 37
Millersport, OH 43046

Dear Mr. Volosky:

As we discussed, I have spoken with our engineering staff regarding your ability to receive a clear "grade B" signal from WBNS-TV. Although you are geographically well within our defined grade B contour area and our signal was fairly strong, your location could experience some reception problems because of the leaf density of your trees, particularly in wet weather.

Because of this potential, we hereby withdraw our challenge to your subscription with Netlink; I will so inform them. Should you have any questions, please contact me.

Sincerely,

Doug Parker

Program & Operations Manager

212 - 102 - 4513
DT-24
a
600 - 438 - 4671
NETLINK

BILLY TAUZIN
Third District, Louisiana

COMMERCE COMMITTEE
REOURCES COMMITTEE

TELECOMMUNICATIONS OFFICE
TELEPHONE 205-455-4001
2100 N. HOUSE MOUNTAIN DRIVE BUILDING
WASHINGTON, DC 20515

Congress of the United States
House of Representatives
Washington, DC 20515-1803

February 13, 1997

DISTRICT OFFICE:
TELEPHONE 504-477-4707
2100 HOUSE MOUNTAIN DRIVE BUILDING
2100 N. HOUSE MOUNTAIN DRIVE
CHICAGO, LA 70303
TELEPHONE 504-477-4707
FARMER, DUBOIS, RICE HWY
HARRIS, LA 70303
TELEPHONE 504-477-4707
3100 EAST MAIN STREET
NEW ORLEANS, LA 70119
TELEPHONE 504-477-4707
BARRINGER PARKER COLLEGE EAST
600 SOUTH MAIN ST.
BRIAR 70304
CHICAGO, LA 70303

Mr. Edward O. Frits
President
National Association of Broadcasters
1771 N St., NW
Washington, DC 20036

Dear Eddie:

I have recently read that the NAB and the SBCA member companies have been meeting to discuss a resolution to the "white area" impasse between the satellite carriers and broadcast affiliates over rules under the Satellite Home Viewer Act.

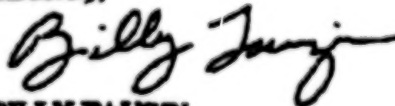
In addition to fielding my own constituents' complaints over the loss of network signal service for some satellite TV subscribers, I am fielding the constituent complaints of other Members of Congress on this issue. As you might imagine, as Chairman of the Telecommunications Subcommittee, Members look to me to protect them against consumer complaints. As such, I urge you to reach agreement on this matter as expeditiously as possible and to be mindful of consumer interests in the outcome of your deliberations.

With respect to consumer interests, I hope you will consider including a "grandfather clause" that would permit consumers who presently receive the network signal service via satellite to continue to do so in the future without having to bear the burden or expense of proving that they are eligible to receive the signal. In addition, I would hope that such an agreement would permit a future satellite TV subscriber to appeal, through a fair and reasonable appeals process, a determination that the subscriber's household is ineligible to receive network signal service via satellite.

I know I will face many angry Members of Congress should service to present consumers be discontinued and I am sure that you can appreciate the great political appeal of the concept of a "grandfather clause."

I want to commend you for working toward a resolution to this important issue. I believe that if this "white area" issue can be resolved, your two industries share much common ground and could possibly form an important alliance which would benefit consumers in this increasingly competitive marketplace.

Sincerely,



BILLY TAUZIN
Chairman
Subcommittee on Telecommunications,
Trade, and Consumer Protection

cc: Mr. Charles C. Hewitt
SBCA

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Before the
LIBRARY OF CONGRESS, COPYRIGHT OFFICE
Washington, D.C.

GENERAL COUNSEL
OF COPYRIGHT

APR 28 1997

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Revision of the Cable and)
Satellite Carrier Compulsory)
Licenses)

Docket No. 97-1

TESTIMONY OF COMCAST CABLE COMMUNICATIONS, INC.

Comcast Cable Communications, Inc., by its attorneys, files this testimony in response to the above-referenced Notice (62 Fed. Reg. 13,396 and 62 Fed. Reg. 18,655; "Notice") to consider (1) the continuing need for the cable television compulsory license and (2) the possible expansion of the satellite carrier compulsory license to cover carriage of local network signals.

I. The Cable Television Compulsory License Continues To Serve a Critical Function and Should Be Retained.

The cable compulsory license was created primarily because Congress recognized "that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was transmitted by a cable system." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89 (1976). Nothing has changed that would make such widespread individual clearance negotiations any more practical or less burdensome.

There are still thousands of cable systems, each typically carrying a number of television stations (with much of this carriage required by Federal Communication Commission must carry rules), and most of these stations typically carry programming each day owned by a wide variety of copyright owners. Much of the programming is scheduled or aired on short notice or with no notice, making it impossible for cable systems to obtain advance clearance to transmit the

material. And much of the programming contains additional copyrighted material (such as musical works, photos, etc.), the copyright ownership of which is not even identified.

Just as it is clear that cable operators have no practical way to obtain private, individual licensing of broadcast copyrighted material, it is also clear that there is no more efficient central clearinghouse model than the compulsory license to use in the cable context. For example, as the Copyright Office knows, the licensing arrangements pursued by performing rights societies such as ASCAP and BMI have led to suits against ASCAP and BMI by the Justice Department, consent decrees, permanent rate courts and years of complex and costly litigation between performing rights societies and users. Private models such as the Copyright Clearance Center do not provide clearance for a sufficiently high percentage of the relevant material, and owner-administered schemes such as The Harry Fox Agency permit owners to refuse clearance or to charge prohibitive rates.

While it is imperfect, the cable compulsory license has provided stability and certainty to systems, stations and copyright owners, permitted hundreds of millions of dollars in royalties to flow to owners, and generated comparatively little litigation. Under the circumstances, the cable license continues to play a critical function, and there is no reason at this point to provide for a phase out of the license.^{1/}

^{1/} In answer to the question posed at Section A.2 of the Notice, for purposes of setting royalty rates, "fair market value" is one factor, but not the only relevant factor in determining appropriate rates. Congress, wisely, also has required copyright arbitration royalty panels to consider setting rates that "maximize the availability of creative works to the public," that reflect distributors' costs, investments and risks, and that minimize any disruptive impact on the structure of the industries involved. 17 U.S.C. § 801(b)(1). It is appropriate to continue this balance of factors in rate-setting proceedings.

II. DBS Should Be Granted a License to Carry Local Network Signals Only if DBS is Regulated in a Manner Comparable to Cable.

DBS operators and other satellite carriers do not have a compulsory license for carriage of network stations to "served households," (see 17 U.S.C. Section 119(a)(2) and (d)(10)) including carriage of network stations in their local television markets. At least one DBS operator, ASkyB, has recently argued that, in order to have parity with cable television operators, DBS operators must be given an expanded compulsory license that would permit DBS operators to provide local carriage of network stations.

DBS operators clearly are competitors to cable operators. Comcast neither fears nor seeks to discourage competition on a level playing field.^{2/} ASkyB, however, seeks the benefits of the local carriage license without the regulatory burdens that accompany it. Any consideration of expansion of the satellite carrier/DBS license can occur only if there is regulatory parity between cable and DBS. The primary -- though not the only -- regulatory burden that has long been associated with the cable compulsory license for local signals is, of course, the FCC must carry rules.^{3/}

As the Copyright Office has recognized, "the final formulation of the Section 111 [cable television] license was predicated on the FCC system of regulation for the cable industry." The Cable and Satellite Carrier Compulsory Licenses: An Overview and Analysis (Report of the

^{2/} Comcast previously filed comments in Docket 96-2 addressing the application of the cable compulsory license to open video systems. A copy of those comments is included as Attachment A hereto. See especially pages 1-4.

^{3/} The third and current set of FCC must carry rules is codified at 47 C.F.R. Sections 76.55-76.64 and was recently found to be constitutional by the Supreme Court in Turner Broadcasting System, Inc. v. FCC, 1997 U.S. Lexis 2078 (Mar. 31, 1997).

Register of Copyrights), 33 (March 1992; hereinafter "Register's Compulsory License Report"). In designing the cable compulsory license, Congress recognized the significant "interplay between the copyright and the communications elements of the legislation." H.R. Rep. No. 1476 at 89; Register's Compulsory License Report at 33.

After careful study of the Copyright Act of 1976, the Copyright Office correctly concluded "that the operation of Section 111 is hinged on the FCC rules regulating the cable industry. The whole concept of distant versus local signals, which forms the foundation of the royalty scheme, is tied to the concept of the must carry rules . . ." Register's Compulsory License Report at 131. One of the main policies supporting enactment of the cable compulsory license was to help facilitate the FCC's scheme for cable carriage of local and other broadcast signals without interference from copyright owners. Id. at 153.

Thus, it is clear that the cable compulsory license for local signals was created in the context of the must carry rules and, to some extent, to help facilitate the operation of the must carry rules. Under these circumstances, it is not clear why Congress would ever have lightly conferred the local signal compulsory license on a major multichannel distributor, with substantial channel capacity, without must carry requirements similar to whatever must carry scheme applied contemporaneously to cable operators.^{4/} Without clear guidance from Congress to the contrary, certainly the Copyright Office is bound to adhere to its long-standing principle

^{4/} The Section 111 compulsory license has been extended to some competing technologies, such as SMATV and MMDS, that have not been subject to must carry rules. These distribution systems did not, when they were deemed eligible for the compulsory license, generally have substantial channel capacity, nor were they backed by significant financial resources. This is in stark contrast to DBS operators, which are owned by giants such as General Motors, AT&T and Fox, among others, and which offer over 100 channels of video programming.

that compulsory licenses are to be construed narrowly, and its view that there is no basis for extending the characteristics or the benefits of the cable compulsory license to satellite carriers, such as DBS operators. 56 Fed. Reg. 31,580, 31,590 (1991); 57 Fed. Reg. 3291 (1992); Register's Compulsory License Report at 127.

While the must carry rules are the primary set of FCC rules related to the cable compulsory license, they are not the only FCC rules involved in the "delicate balance of regulation" (Register's Compulsory License Report at 33) that affects cable operators' ability to carry broadcast signals. The FCC's rules on network nonduplication, syndicated program exclusivity protection, program access and channel set-asides for public, educational, governmental and commercial leased access channels directly affect cable carriage of broadcast signals. Other FCC rules, such as the broadcast-cable cross-ownership rules and the rules permitting the imposition of local franchise fees, also affect cable and its ability to provide broadcast and other signals.

For a competitor that is subject to none of these related rules and limitations, but who cries foul about differences in the two compulsory licenses, the answer is a simple one: regulatory parity. When DBS is subject to these or similar FCC rules, it will have a more persuasive case for an expanded compulsory license. In the meantime, it takes some nerve to demand cable's benefits while refusing to accept the corresponding burdens and obligations.

Conclusion

The cable television compulsory license continues to perform an indispensable function, and should be retained. In addition, any consideration of expanding the satellite carrier license to cover carriage of local signals must be accompanied by regulatory parity between cable and DBS.

Respectfully submitted,

COMCAST CABLE COMMUNICATIONS, INC.

By: David J. Wittenstein
David J. Wittenstein

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1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036-6802
(202) 776-2000

Thomas R. Nathan, Esq.
Comcast Corporation
1500 Market Street
Philadelphia, PA 19102

April 28, 1997

ATTACHMENT A

Testimony of Comcast Cable Communications, Inc.
Docket No. 97-1
April 28, 1997

Before the
LIBRARY OF CONGRESS, COPYRIGHT OFFICE
Washington, D.C.

No. 6

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Eligibility for the
Cable Compulsory
License

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)
)

Docket No. 96-2

COMMENTS OF COMCAST CABLE COMMUNICATIONS, INC.

Comcast Cable Communications, Inc., by its attorneys, files these comments in response to the above-referenced Notice of Inquiry (61 Fed. Reg. 20197; "Notice") to consider (1) the application of the cable television compulsory license to open video system ("OVS") programmers and (2) the eligibility of OVS platform providers for the passive carrier exemption of Section 111(a)(3) of the Copyright Act of 1976, as amended (the "Act").

I. If OVS is Deemed Eligible for the Cable Compulsory License, It Must Follow the Same Reporting Rules That Are Applied to Cable Systems.

If the Copyright Office concludes that OVS is eligible for the cable television compulsory license, the key principle must be that the reporting rules apply to OVS operations in the same way in which they apply to cable systems. The primary set of OVS reporting problems would result from the fact that OVS is specifically designed to function as a multi-programmer platform, which, under existing law, would clearly require all of the programmers on any particular OVS platform or facility to report as though they were a single cable system, aggregating both their revenues and their signal carriage.

Section 111(f) requires that "two or more cable systems . . . operating from one head-end shall be considered as one system." For nearly twenty years, one of the guiding principles of the

Copyright Office implementation of the compulsory license has been to ensure that separate systems operating from one headend, whether under common ownership or not, must report as though they were one system. The same rule has also been consistently applied to technically interconnected cable systems. The Copyright Office has been determined to avoid "artificial fragmentation" of what, to cable operators at least, have often seemed to be separate and unrelated cable systems.^{1/}

It is possible that many of the thorniest practical reporting problems for OVS will hinge on the decision of the Copyright Office in its long-pending proceeding on phantom signals, mergers and acquisitions.^{2/} The Copyright Office sought comment on a host of relevant issues in that proceeding, but still has not issued a decision almost seven years after the start of the proceeding.

Cable operators have had to live for many years not only with the statutory obligation for joint reporting but also with the Copyright Office's very strict rules on phantom attribution. If

1/ Even in its earliest efforts to implement the cable compulsory license scheme, the Copyright Office cited the legislative history of the Act to show the determination of Congress to "avoid artificial fragmentation of cable systems." 43 Fed. Reg. 958 (Jan. 5, 1978); 42 Fed. Reg. 61051 (Dec. 1, 1977). When a commenter complained that the Copyright Office approach would lead to "the artificial combination of two completely separate systems into a single system merely because . . . they use a single headend," the Copyright Office rejected this complaint as inconsistent with the language of Section 111(f) of the Act. 43 Fed. Reg. at 958. The Copyright Office concluded that systems operating from one headend must report as a single system even if they are not under common ownership or control. *Id.* Moreover, the Copyright Office has consistently reaffirmed its view that, under the statute, systems that are technically interconnected must be considered to operate from one headend, and therefore constitute one cable system for purposes of Section 111. See, e.g., Letter from Dorothy Schrader, General Counsel, to Todd J. Parriott (Dec. 5, 1988)(cable systems connected by microwave feed constitute one cable system).

2/ Compulsory License for and Merger of Cable Systems, Notice of Inquiry, Docket No. RM 89-2, 54 Fed. Reg. 38390 (Sept. 18, 1989).

the Copyright Office liberalizes its general interpretation of these issues, perhaps that change would benefit both cable systems and OVS programmers. But the Copyright Office cannot simply permit OVS programmers sharing a common OVS platform or facility to file separate statements of account, or to avoid the rules on aggregation of revenues and signals that apply to cable systems.

Indeed, OVS programmers cannot file separate statements of account because they cannot qualify as separate cable systems. The first element of the statutory definition of a "cable system" in Section 111(f) is that the system must be "a facility . . ." In the OVS model, there will be a single platform or facility; regardless of the number of programmers or users of channels, there will be only one facility (the platform itself), hence only one cable system, and only one consolidated filing. For this reason, the Copyright Office has consistently concluded, for example, that leased access channel users or programmers cannot qualify as cable systems. All leased access channel activity must be reported on the single statement of account filed by the owner of the cable system facility on which the leased channel is located.²

In fact, the potential for abuse is great if same-platform OVS programmers do not report as a single cable system. By joint efforts on programming line-ups and marketing (or even by "winks" or other signals or understandings), OVS programmers could divide up carriage of various distant signals, each OVS programmer avoiding the high 3.75% rate, but together offering more base rate distant signals than the local cable operator, who is constrained by the 3.75% rate. Or OVS programmers could use schemes to "trade" or shift subscribers or revenues

^{2/} See, e.g., Letter of Marilyn J. Kretzinger, Acting General Counsel, to John P. Weigand (April 13, 1994) (leased access channel programmer is not a "facility" and is therefore not an independent cable system; its broadcast signal carriage must be included on underlying cable system statement of account).

to avoid either Form 3 reporting status or the application of high rates to a sizable specific gross receipts pool.⁴

II. An OVS Platform Provider Cannot Qualify as a Passive Carrier.

The video dialtone model that OVS is designed to replace may have permitted telephone companies to claim that they were limited to the kind of "dumb pipe" activities that the passive carrier exemption of Section 111(a)(3) of the Act was designed to protect. The role of an OVS platform provider, however, cannot be squared with the specific limitations imposed by Section 111(a)(3).

For example, an entity hoping to qualify for the copyright exemption in Section 111(a)(3) must be functioning as a "carrier" when it transmits the copyrighted material. However, Congress specifically stated (47 U.S.C. Section 573(c)(1) and (3)) that OVS platform providers are regulated not under Title II of the Communications Act (which governs carriers), but under Title VI, which governs cable systems. In addition, Section 111(a)(3) is available only where a carrier has no control over the selection of primary transmissions. Yet OVS platform providers have discretion to decide how to divide their channel capacity (subject to nondiscrimination requirements), to decide which duplicative programming services

4/ The joint reporting obligation may well also be triggered on a larger geographic scale. The Regional Bell Operating Companies or other large local exchange companies (LECs) that may operate OVS platforms typically operate large, interconnected facilities. For example, Bell Atlantic's land-based facilities in Philadelphia also connect to Baltimore and to Washington, as well as the various communities in between. In this situation, the LEC facility, to the extent that it is used to provide OVS in Philadelphia and Baltimore, will be a single, interconnected facility, probably requiring that all of the OVS operations on the facility report as a single system -- unless the Copyright Offices sees fit to provide parallel relief to the increasingly large number of technically-interconnected cable systems.

offered by multiple programmers will share a single channel on the system, and to make other decisions that affect the content on the system.⁵

Finally, many of the business functions that OVS platform providers may provide would push them well outside the exemption. The act of scrambling the signals carried on the OVS platform and selling or leasing descramblers to subscribers falls outside the scope of Section 111(a)(3), according to the Copyright Office. Letter of Ralph Oman, Register of Copyrights, to The Honorable Robert W. Kastenmeier (Mar. 17, 1986)(otherwise exempt satellite carriers would lose the exemption if they engaged in these activities).

The OVS platform provider plainly will be involved in activities inconsistent with the passive carrier exemption; the opportunity for mischief becomes even greater in situations in which the same entity not only provides the platform, but also serves (itself or through an affiliated entity) as one of the programmers on the system. In such a situation, its incentives to make content and channel-based decisions as the platform provider would become irresistible.

It is for the Copyright Office (or Congress) to decide whether, when it engages in OVS platform activities, a company is functioning as a cable system or as some other type of user of copyrighted material. However, given the long tradition of narrowly construing exemptions and exceptions to the copyright law,⁶ it is clear that OVS platform providers cannot qualify for the passive carrier exemption of Section 111(a)(3).

^{5/} See generally Second Report and Order, FCC CS Docket No. 96-46 (released June 3, 1996).

^{6/} E.g., *Fame Publishing Co., Inc. v. Alabama Custom Tape, Inc.*, 507 F.2d 667, 670 (5th Cir. 1975). See also, 49 Fed. Reg. 14944, 14950-51 at n.38 (April 16, 1984)(cable compulsory license).

Conclusion

If the Copyright Office concludes that OVS programmers are entitled to the cable television compulsory license, it must subject OVS programmers to the same reporting rules that apply to traditional cable systems, including the rules requiring consolidated filings. In addition, the Copyright Office cannot conclude that the providers of OVS platforms are entitled to the narrow passive carrier exemption of Section 111(a)(3).

Respectfully submitted,

COMCAST CABLE COMMUNICATIONS, INC.

By: David J. Wittenstein
David J. Wittenstein

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1200 New Hampshire Avenue, N.W.
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July 3, 1996

ORIGINAL

Before the
LIBRARY OF CONGRESS, COPYRIGHT OFFICE
Washington, D.C.

GENERAL COUNSEL
OF COPYRIGHT

APR 28 1997

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Revision of the Cable and)
Satellite Carrier Compulsory)
Licenses)

Docket No. 97-1

TESTIMONY OF PAXSON COMMUNICATIONS CORPORATION

Paxson Communications Corporation,^{1/} by its attorneys, files this testimony in response to the above-referenced Notice (62 Fed. Reg. 13,396 and 62 Fed. Reg. 18,655; "Notice") to consider (1) the continuing need for the cable television compulsory license and (2) the possible expansion of the satellite carrier compulsory license to cover DBS carriage of local network signals.

I. The Cable Television Compulsory License Continues To Serve a Critical Function and Should Be Retained.

As the Copyright Office has recognized, the cable compulsory license was designed in large measure to provide "a mechanism for cable systems to retransmit broadcast programming without clearing rights from copyright owners through private negotiations, thereby assuring public access to the programming..." The Cable and Satellite Compulsory Licenses: An Overview and Analysis (Report of the Register of Copyrights) 153 (March 1992; hereinafter

^{1/} Paxson is one of the largest television station group owners in the country, with approximately fifty-two stations owned by, affiliated with, or pending acquisition by Paxson.

"Register's Compulsory License Report"). The cable compulsory license was created to facilitate the cable carriage of broadcast signals.

The cable compulsory license was necessary because Congress recognized "that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner [of broadcast programming] whose work was transmitted by a cable system." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89 (1976). Nothing has changed that would make such widespread individual clearance negotiations any more practical or less burdensome.

There are still thousands of cable systems, each typically carrying a number of television stations (with much of this carriage required by Federal Communication Commission must carry rules), and most of these stations typically carry programming each day owned by a wide variety of copyright owners. Much of the programming is scheduled or aired on short notice or with no notice, making it impossible for cable systems to obtain advance clearance to transmit the material. And much of the programming contains additional copyrighted material (such as musical works, photos, etc.), the copyright ownership of which is not even identified.

Just as it is clear that cable operators have no practical way to obtain private, individual licensing of broadcast copyrighted material, it is also clear that there is no more efficient central clearinghouse model than the compulsory license to use in the cable context. For example, as the Copyright Office knows, the licensing arrangements pursued by performing rights societies such as ASCAP and BMI have led to suits against ASCAP and BMI by the Justice Department, consent decrees, permanent rate courts and years of complex and costly litigation between performing rights societies and users. Private models such as the Copyright Clearance Center do not provide clearance for a sufficiently high percentage of the relevant material, and owner-

administered schemes such as The Harry Fox Agency permit owners to refuse clearance or to charge prohibitive rates.

While it is imperfect, the cable compulsory license has provided stability and certainty to systems, stations and copyright owners, facilitated local and other carriage of broadcast stations on cable systems, permitted hundreds of millions of dollars in royalties to flow to owners, and generated comparatively little litigation. Under the circumstances, the cable license continues to play a critical function, and there is no reason at this point to provide for a phase out of the license.^{2/}

II. DBS Should Be Granted a License to Carry Local Network Signals Concurrently with its Assumption of Must Carry Obligations.

DBS operators and other satellite carriers do not have a compulsory license for carriage of network stations to "served households," (see 17 U.S.C. Section 119(a)(2) and (d)(10)) including carriage of network stations in their local television markets. At least one DBS operator, ASkyB, has recently argued that, in order to have parity with cable television operators, DBS operators must be given an expanded compulsory license that would permit DBS operators to provide local carriage of network stations.

Paxson agrees that it is appropriate to give DBS operators this expanded local carriage license -- but only concurrently with the assumption of must carry obligations by DBS operators.

^{2/} In answer to the question posed at Section A.2 of the Notice, for purposes of setting royalty rates, "fair market value" is one factor, but not the only relevant factor in determining appropriate rates. Congress, wisely, also has required copyright arbitration royalty panels to consider setting rates that "maximize the availability of creative works to the public," that reflect distributors' costs, investments and risks, and that minimize any disruptive impact on the structure of the industries involved. 17 U.S.C. § 801(b)(1). It is appropriate to continue this balance of factors in rate-setting proceedings.

The cable license to carry local originals was created in 1976 to facilitate the FCC's must carry rules and the important policies underlying the rules. By enacting legislation in 1992 mandating the third and current set of must carry rules,^{3/} Congress confirmed the continuing importance and vitality of these policies. And by upholding the constitutionality of the must carry rules in Turner Broadcasting System, Inc. v. FCC 1977 U.S. Lexis 2078 (Mar. 31, 1997), the U.S. Supreme Court reconfirmed that the must carry rules further important governmental interests.

Nor is there any doubt about the connection between the cable must carry rules and the cable compulsory license. As the Copyright Office has recognized, "the final formulation of the Section 111 [cable television] license was predicated on the FCC system of regulation for the cable industry." Register's Compulsory License Report at 33. In designing the cable compulsory license, Congress recognized the significant "interplay between the copyright and the communications elements of the legislation." H.R. Rep. No. 1476 at 89; Register's Compulsory License Report at 33.

After careful study of the Copyright Act of 1976, the Copyright Office correctly concluded "that the operation of Section 111 is hinged on the FCC rules regulating the cable industry. The whole concept of distant versus local signals, which forms the foundation of the royalty scheme, is tied to the concept of the must carry rules . . ." Register's Compulsory License Report at 131. As noted earlier, one of the main policies supporting enactment of the cable compulsory license was to help facilitate the FCC's scheme for cable carriage of local broadcast signals without interference from copyright owners. Id. at 153.

^{3/} The third and current set of FCC must carry rules is codified at 47 C.F.R. Sections 76.55-76.64.

Thus, it is clear that the cable compulsory license for local signals was created in the context of the must carry rules and, to a large extent, to help facilitate the operation of the must carry rules. Under these circumstances, it is not clear why Congress would ever have lightly conferred the local signal compulsory license on a major multichannel distributor, with substantial channel capacity, without must carry requirements similar to the must carry scheme applied contemporaneously to cable operators.^{4/}

Accordingly, Paxson favors expansion of DBS's compulsory license, but only coupled with must carry obligations substantially identical to the cable must carry obligations. Otherwise, the compulsory license would become a device by which companies like ASkyB can pick broadcast station winners and losers in television markets across the country. Such a result would be completely inconsistent with the policies promoted by the must carry rules and compulsory license.

4/ The Section 111 compulsory license has been extended to some competing technologies, such as SMATV and MMDS, that have not been subject to must carry rules. These distribution systems did not, when they were deemed eligible for the compulsory license, generally have substantial channel capacity, nor were they backed by significant financial resources. This is in stark contrast to DBS operators, which are owned by giants such as General Motors, AT&T and Fox, among others, and which offer over 100 channels of video programming.

Conclusion

The cable television compulsory license continues to perform an indispensable function, and should be retained. In addition, any consideration of expanding the satellite carrier license to cover carriage of local signals must be accompanied by the assumption of full must carry obligations by DBS operators.

Respectfully submitted,

PAXSON COMMUNICATIONS CORPORATION

By: 

John R. Feore, Jr.

David J. Wittenstein

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1200 New Hampshire Avenue, N.W.
Suite 800
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(202) 776-2000

April 28, 1997

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April 28, 1997

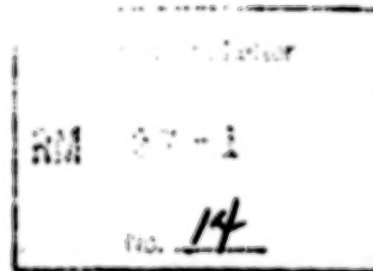
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APR 28 1997

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William Roberts, Esq.
Senior Attorney
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James Madison Memorial Building, Rm. LM-403
First and Independence Ave., S.E.
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Re: Docket No. 97-1; Revision of the Cable and Satellite Carrier Compulsory Licenses; Written Testimony of James B. Ramo, DIRECTV, Inc.

Dear Mr. Roberts:

Enclosed please find fifteen (15) copies of the written testimony of Mr. James B. Ramo, Executive Vice President of DIRECTV, Inc. ("DIRECTV"), submitted in connection with the above-referenced docket. DIRECTV is the nation's leading provider of direct broadcast satellite ("DBS") services. Mr. Ramo's testimony summarizes DIRECTV's position with respect to a variety of issues raised by the Copyright Office regarding the satellite carrier compulsory license.

LATHAM & WATKINS

William Roberts, Esq.

April 28, 1997

Page 2

Thank you for your consideration. Should you have any questions or require further information, please do not hesitate to contact me.

Very truly yours,


James H. Barker
of LATHAM & WATKINS

Counsel for DIRECTV, Inc.

cc: James B. Ramo, DIRECTV, Inc.
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RM	97-1
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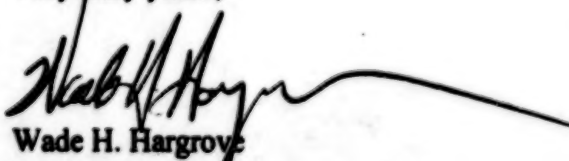
Re: Docket No. 97-1
Compulsory Licenses

Dear Ms. Petruzzelli:

Transmitted herewith on behalf of The Network Affiliated Stations Alliance ("NASA"), a coalition of over 650 local television broadcast stations affiliated with the ABC, CBS and NBC Television Networks, are an original and fifteen (15) copies of NASA's Statement for filing in the above-referenced docket.

If any questions should arise during the course of your consideration of the Statement, it is respectfully requested that you communicate with the undersigned.

Very truly yours,


Wade H. Hargrove
Counsel to
The Network Affiliated Stations Alliance

WHH/ks
Enclosure

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**Before The
Copyright Office
Library Of Congress
Washington, D.C.**

In Re The Revision Of The Cable
And Satellite Compulsory Licenses)
)

Docket No. 97-1

**STATEMENT OF
THE NETWORK AFFILIATED STATIONS ALLIANCE
ON
THE SATELLITE COMPULSORY LICENSE**

April 28, 1997

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STATEMENT OF THE NETWORK AFFILIATED STATIONS ALLIANCE

The Network Affiliated Stations Alliance ("NASA") is a coalition of the ABC, CBS and NBC Television Affiliate Associations. NASA consists of over 650 local television stations throughout the nation that are affiliated either with the ABC, CBS or NBC broadcast networks.

This statement is directed to the Satellite Home Viewer Copyright Act ("SHVA" or "Act")¹ and proposals to expand the Act to permit satellite carriage of local broadcast stations.

History Of The Act

The SHVA was adopted by Congress in 1988 to facilitate the delivery of broadcast network programming by satellite to dish owners who, because of distance or terrain, are unable to receive a signal of at least Grade B intensity from a local television station affiliated with that network. The Act had a dual purpose: (1) To enable households located beyond the reach of a local affiliate to obtain access to broadcast network programming by satellite and (2) to protect the existing network/affiliate distribution system.²

¹17 U.S.C. §119

²H. Rept. 100-887, Part 1 on H.R. 2848 (*The Satellite Home Viewer Copyright Act*), 100th Cong., 2d Sess., at 8 (August 18, 1988)

The Act created a limited statutory copyright—a "compulsory license"—authorizing satellite carriers to uplink a distant network station (without the station's consent and without having purchased the underlying copyrights in the station's programming) and retransmit the station by satellite to households located in areas ("white areas") that cannot receive the same network programming from a local affiliate. Congress contemplated that the delivery of duplicating network programming would be confined to a small number of households located largely in rural areas:

"The bill will benefit 'rural America, where significant numbers of farm families are inadequately served by broadcast stations licensed by the Federal Communications Commission.'"³

* * *

"In essence, the statutory license for network signals applies in areas where the signals cannot be received via rooftop antenna or cable."⁴

* * *

"The Act provides a 'limited interim compulsory license' for the sole purpose of facilitating the transmission of each

³*Id.* at 15

⁴*Id.*

network's programming to 'white areas' which are unserved by that network."⁵

* * *

"The special statutory copyright for satellite service was created 'in recognition of the fact that a *small percentage* of television households cannot now receive a clear signal of the three national television networks.'"⁶ [Emphasis added.]

* * *

"The statutory copyright 'will benefit rural America. . . .'"⁷

The Federal Communications Commission, in a rulemaking proceeding to implement the Act, noted that "while estimates vary, the consensus appears to be that 800,000 to 1 million households" are located in "white areas."⁸ Both SBN (now PrimeTime 24) and Netlink put the number of unserved households at approximately 1 million.⁹ In hearings before Congress, Ralph Oman, the then Register Of Copyrights,

⁵H. Rept. 100-887, Part 2 on H.R. 2848 (*The Satellite Home Viewer Copyright Act*), 100th Cong., 2d Sess., at 19 (September 29, 1988)

⁶*Id.*

⁷H. Rept. 100-887, Part 1, *supra* at 15

⁸In *The Matter Of Inquiry Into The Scrambling Of Satellite Signals And Access To Those Signals By Owners Of Home Satellite Dish Antennas Report*, FCC Docket No. 86-336, 2 FCC Rcd 1669, 64 RR2d 910, 922-23 (1987) at ¶64

⁹*Id.* at Footnote 41

agreed that the number of "white area" households affects only a "relatively small number of viewers. . . ." ¹⁰

The Act represented a careful balance on the one hand between the interest of unserved households in securing access to broadcast network programming and a Congressional interest, on the other, in preserving the national network/local affiliate television program distribution system by protecting the copyright held by each affiliate for exhibition of its network programming. At the heart of the Act was an acknowledgment by Congress of the national interest in preserving the longstanding national network/local affiliate television partnership:

"This television network-affiliate distribution system involves a unique combination of national and local elements, which has evolved over a period of decades. The network provides the advantages of program acquisition or production and the sale of advertising on a national scale, as well as the special advantages flowing from the fact that its service covers a wide range of programs throughout the broadcast day, which can be scheduled so as to maximize the attractiveness of the overall product. But while the network is typically the largest single supplier of nationally produced programming for its affiliates, the affiliate also decides which network programs are locally broadcast; produces local news and other programs of special interest to its local audience, and creates an overall program

¹⁰Statement of Ralph Oman, Before The Subcommittee On Courts, Civil Liberties And The Administration Of Justice, House Committee On The Judiciary, 100th Cong., 1st Sess., January 27, 1988

schedule containing network, local and syndicated programming."

* * *

"... [T]he network-affiliate partnership serves the broad public interest. It combines the efficiencies of national production, distribution and selling with a significant decentralization of control over the ultimate service to the public. It also provides a highly effective means whereby the special strengths of national and local program service support each other. This method of reconciling the values served by both centralization and decentralization in television broadcast service has served the country well."¹¹
[Emphasis supplied.]

* * *

"... [T]he bill respects the network/affiliate relationship and promotes localism."¹²

* * *

"The Committee believes that this approach will satisfy the public interest in making available network programming in these (typically rural) areas, while also respecting the public interest in protecting the network-affiliate distribution system."¹³

¹¹H. Rept. 100-887, Part 2, *supra* at 20

¹²H. Rept. 100-887, Part 1, *supra* at 14

¹³H. Rept. 100-887, Part 2, *supra* at 19-20

Congress recognized that an important public interest distinction between the services offered by satellite carriers and those offered by local affiliates is that satellite broadcast services are available only to those who can afford to pay for them while broadcast services provided by local affiliates are free for everyone. Accordingly, protection of the nation's free, universal broadcast service was a core policy objective.

"Free local over-the-air television stations continue to play an important role in providing the American people information and entertainment. The Committee is concerned that changes in technology, and accompanying changes in law and regulation, do not undermine the base of free local television service upon which the American people continue to rely."¹⁴

To enable local stations to monitor compliance by satellite carriers with the limitations of their copyright, the Act required satellite carriers to furnish broadcast networks, on a monthly basis, a list of the names and addresses, including zip codes, of their new subscribers along with a list of terminated subscribers. The networks aggregate these subscriber lists for each local television market and provide them to their local affiliates. Each affiliate reviews the lists, and if it believes a satellite carrier is violating the terms of its statutory copyright, the affiliate may either write a letter to the satellite carrier identifying subscribers the affiliate believes do not qualify for delivery of duplicating

¹⁴H. Rept. 100-887, Part 2, *supra* at 26

network programming and request that the carrier terminate broadcast network service to those subscribers or the affiliate may immediately file a copyright infringement action in federal court.

The Act established a three-part test for determining whether a household qualifies for satellite broadcast service under the statutory license:

- * The satellite dish must be used for "private home viewing"--thus, distant network stations may not be delivered to sports bars, lounges and restaurants,
- * The receiving site must not be able to receive by the use of a conventional outdoor rooftop antenna a "measured" signal of at least Grade B intensity (as determined under FCC rules) from a local affiliate of the same network or from a translator carrying that affiliate, and
- * The home must not have received by means of cable television a station affiliated with the same network within the 90-day period before satellite delivery of network service began.

Believing satellite carriers would follow the law and respect the limits of their statutory copyright, broadcasters did not object to the new favored copyright status for satellite carriers. Broadcasters assumed that satellite carriers would, in good faith, honor their commitment to Congress and comply with the limits of their copyright.

The Act was amended in 1994. Disputes between satellite carriers and local affiliates over the "white area" issue had become widespread and in an attempt to discourage satellite carriers from signing up illegal subscribers and local affiliates from

making invalid challenges, the 1994 amendment added a "loser pays for the cost of measurement" provision. Under this provision, if a local broadcaster wrongfully challenges a subscriber, the broadcaster must reimburse the satellite carrier for any signal measurement costs the satellite carrier may have incurred. By the same token, if a satellite carrier wrongfully provides service to a home that does not qualify for the service, the satellite carrier must reimburse the local affiliate for any signal measurement costs the broadcaster may have incurred in measuring the signal at the subscriber's household. The 1994 amendment also clarified that the burden of measurement and of proving whether a household can receive a Grade B signal from a local affiliate is on the satellite carrier--not the affiliate. And, for the first time, the Fox Network was covered by the Act.

The Broken Promise

Hardly had the ink dried on the 1988 Act when local broadcasters began to realize that satellite carriers were exceeding the limits of their compulsory license and infringing the copyright of local affiliates on a massive scale. The satellite carriers were marketing and selling distant broadcast network stations indiscriminately to dish owners who could easily receive the same network from a local affiliate. As a result, NASA initiated discussions with the satellite carriers shortly after the Act became law in the hope that a voluntary inter-industry compliance and enforcement program might be established.

Attached as Exhibit A is a compliance and enforcement program submitted by NASA to one of the satellite carriers, PrimeTime 24, in 1991. PrimeTime 24 rejected the proposal.

NASA continued its negotiations over a five-year period with all of the satellite carriers in anticipation that agreement might eventually be reached on a compliance and enforcement program. Those negotiations proved unsuccessful.

All the while, satellite carriers continued to market their broadcast network service—not as a "white area" supplemental service as Congress had envisioned—but rather as a broadcast network "time shifting" and "out-of-market" sports programming service. Exhibit B contains copies of various satellite carrier ads promoting "time shifting" of broadcast network programming and the availability of out-of-market sports programs—many of which may not legally be televised locally.

Here is what PrimeTime 24's ads promote:

"All the football you need is on PrimeTime 24 . . . over 100 games on PT East, PT West and Fox . . . the only place you can get all 10 playoff games . . . plus your favorite network programs from 7 major cities . . . PrimeTime 24—Your network and football connection."

[PrimeTime 24 ad]

* * *

"Do your customers know they can get the networks on their DBS system?"

[PrimeTime 24 ad]

* * *

"Don't miss out on a big DBS sale because you're unsure about the programming. Network television is a top programming concern with potential DBS dish customers, and now you can tell them with confidence that it's available to them if they qualify."

[PrimeTime 24 ad]

* * *

"With PrimeTime 24's network affiliates, your DBS customers won't miss one minute of their favorite prime time programs, daytime soaps, evening news and seasonable sports on East and West Coast feeds."

[PrimeTime 24 ad]

It is noteworthy that in all of the ads, disclosure of the statutory "white area" restriction is relegated to fine print which is hardly discernable without magnification. Consumers have been misled by countless advertisements like these and by the failure of satellite service providers and their agents and distributors to disclose fully and conspicuously the "white area" service restrictions.

Time and again, affiliates have discovered that homes located within only a few miles and in plain view of their station's transmitting towers are receiving satellite service

from a duplicating distant network station located hundreds (in some cases thousands) of miles away. Affiliates have expended countless hours and incurred substantial legal fees in a never ending effort to monitor and assure satellite carrier compliance. Comments being filed in this proceeding by the National Association of Broadcasters contain evidence of extensive violations of the Act in sampled markets throughout the country.

The facts surrounding a lawsuit filed by NBC affiliate KAMR-TV, Amarillo, Texas, to enforce its rights under the SHVA demonstrate the stunning extent of violations by PrimeTime 24. Signal intensity measurements were made by independent professional broadcast engineers in connection with the KAMR-TV litigation at 273 randomly selected PrimeTime 24 household locations within the predicted Grade B signal contour of KAMR-TV. Field strength signal measurements were made at each of these 273 locations in accordance with engineering standards and procedures described in the rules of the Federal Communications Commission. Those measurements revealed that a Grade B intensity or greater intensity signal existed at 262 of the 273 PrimeTime 24 household locations or at 96% of all locations measured. In short, almost every PrimeTime 24 subscriber household randomly selected for measurement of Grade B intensity is unlawfully subscribing to such service.

In a lawsuit pending in Miami, of the site measurements taken at 200 PrimeTime 24 household subscribers, all of them--100%--were found to be receiving PrimeTime 24's broadcast service illegally.

The number of households now receiving a broadcast network service by satellite exceeds 3 million—some 2 million more households than the FCC has said were beyond the reach of local network service. That, itself, is a compelling indicator of the extent to which satellite carriers have been violating the limits of their statutory license.

Congress was not unmindful in adopting the SHVA of the difficulty local affiliates would likely have in verifying whether satellite service subscribers were properly being screened and qualified for service by their satellite carriers. With that in mind, Congress admonished the carriers to be "... diligent in avoiding and correcting violations through an internal compliance program that includes ... [among other things] sample site measurements and periodic audits, all of which must be served upon each network ... to monitor the distributor's compliance with the statute."¹⁵ [Emphasis supplied.]

To the best of our knowledge, satellite carriers have conducted few, if any, "site measurements" or "audits." If so, they have not shared the measurements or audits with the networks or their affiliates as Congress plainly requested.

Having tolerated for eight years infringement of their copyrights and having spent some five years in fruitless negotiation with the satellite industry, the national broadcast

¹⁵H. Rept. 100-887, Part 1, *supra* at 19

networks and local network affiliates began last year to file infringement actions. Lawsuits are now pending against PrimeTime 24 in Texas,¹⁶ Florida¹⁷ and North Carolina.¹⁸

In the summer of 1996, the National Association of Broadcasters initiated a new round of negotiations with the three satellite carriers in the hope, once again, that agreement might be reached on a voluntary inter-industry compliance and enforcement program. Two of the carriers, Netlink and PrimeStar, evidenced a willingness to negotiate in good faith and a compliance and enforcement agreement has, in principle, been reached with them. Under the agreement,

- * The parties will identify by zip code specific areas in each local market that, based on agreed upon engineering projections, are likely to receive a signal of Grade B intensity from each affiliate. Satellite service of broadcast network programming will not be provided to those areas without, first, securing permission from the local affiliate or conducting a signal measurement at the subscriber's household. (The goal is to resolve the reception issue to the fullest extent possible before, not after, satellite service begins--a process, it is hoped, that will eliminate viewer confusion and frustration.)
- * In areas within each local market where engineering projections (again, projections agreed upon by the parties) indicate that a Grade B signal

¹⁶*Cannan Communications, Inc. v. PrimeTime 24 Joint Venture, Case No. 2-96-CV-086, U.S.D.C.-Northern District Of Texas-Amarillo Division*

¹⁷*CBS Inc., et al. v. PrimeTime 24 Joint Venture, Case No. 96-3650-CIV-Nesbitt, U.S.D.C.-Southern District Of Florida*

¹⁸*ABC, Inc. v. PrimeTime 24 Joint Venture, Case No. 1:97CV00090, U.S.D.C.-Middle District Of North Carolina-Durham Division*

cannot be received from a local affiliate, satellite service may be authorized with the understanding that the affiliate reserves the right to object pursuant to the terms of the SHVA.

- * A phase-out transition period will be provided for existing subscribers that do not qualify for broadcast network service.
- * And finally, the parties have agreed that the appropriate viewing standard is the Act's Grade B standard and agreement has been reached on a measurement methodology for determining whether specific households can receive a Grade B signal.

Local affiliates have agreed to exhaust their remedies under the voluntary agreement before commencing an infringement action against the signatory carriers. The industry agreement with Netlink and PrimeStar is evidence that, given a shared commitment, the Act and its "white area" restrictions can be implemented consistent with the original Congressional policy objectives.

A Subjective Vs. Objective Signal Standard

PrimeTime 24, unfortunately, has refused to sign the industry compliance agreement. Instead, it has launched a nationwide public relations/government relations "scare" campaign to frighten *all* of its satellite subscribers into believing *all* their satellite services are somehow threatened by the broadcast industry. A copy of a communication sent by PrimeTime 24 to its subscribers is contained in Exhibit C. The document urges subscribers to call "1-888-SAVE-MY TV." Contrary to PrimeTime 24's assertion, only those subscribers who are *unlawfully* receiving a *broadcast network* signal are affected by

infringement litigation--and the *only* services affected are the duplicating *broadcast network* services that those subscribers can readily receive over-the-air from their local network affiliated stations.

PrimeTime 24 has asked its subscribers to call and write members of Congress requesting that the Satellite Home Viewer Act be amended. PrimeTime 24 argues that the legal standard for satellite delivery of broadcast network programs should be changed from the "objective" Grade B standard to a "subjective" picture quality standard. What may be considered to be a "good" television picture for one may, of course, not be for another. Congress wisely incorporated in the Act the FCC's "objective" Grade B standard. To substitute a "subjective" picture quality standard for an "objective" standard would eviscerate the statute. Imagine a judge or jury in an infringement action having to look at several hundred thousands of photographs and videotapes and evaluate them on the basis of an ill-defined subjective standard to determine if an infringement has occurred. It can't be done. The magnitude of the process would produce regulatory gridlock and would, ultimately, be self-defeating. Moreover, it would be impossible for courts to apply a subjective standard on anything approaching a uniform or consistent basis. In turn, inconsistent application would become the subject of endless litigation and appeal. Finally, variances in the quality of videotapes, videotape machines, cameras and playback equipment used in the process would add to the problem. In short, to substitute the Grade B standard with a subjective picture quality standard would be tantamount to repeal of the

Act and the protection it affords for the integrity of the copyright held by each affiliate for its network programming and for the network/affiliate television program distribution system.

It long ago became necessary for the Federal Communications Commission ("FCC" or "Commission") to decide the issue, in other contexts, of whether a specific site could or could not receive an acceptable television signal. The FCC has uniformly selected an objective--rather than subjective--standard for determining an acceptable level of service. The Grade B standard--which can be measured objectively by a field strength meter--has long been the FCC's standard for acceptable service. It has served as the basis, among other things, for the FCC's table of television channel assignments, the multiple ownership rules, and various other regulatory requirements. Field strength measurements are routinely taken by broadcasters, cable operators and the FCC to determine the extent to which a particular site can receive an acceptable picture. Households located within a television station's Grade B signal are, by FCC definition, located within the station's "primary service area."

It became necessary for Congress, in enacting "must carry" requirements in the Cable Act of 1992, to address, again, the signal quality issue. Under the Cable Act, cable television systems are required to carry local television broadcast stations if the cable system can receive a signal of specified intensity at the cable system's receiving site.¹⁹ The

¹⁹47 U.S.C. §534(h)

standard specified by Congress--and implemented by the FCC--is an objective technical standard.

Following enactment of the 1992 Cable Act, the FCC issued various orders and case rulings in which it delineated a measurement methodology, consistent with sound engineering practices, for broadcasters and cable operators to utilize and follow in determining the presence of specified signal levels at a cable television receiving antenna. The Commission rejected the use of videotapes or photographs for this purpose. In *In Re Complaint Of Independence Public Media Of Philadelphia, Inc.*, a cable company argued, as PrimeTime 24 does here, that the objective signal measurement standard was inadequate.²⁰ The cable system submitted in support of its argument videotapes and photographs to demonstrate its alleged reception difficulties. The Commission refused to accept the proposed subjective picture standard in lieu of the objective signal level standard, stating:

" . . . [W]e will generally not consider photographs, photographs of a videotape, or the videotape itself to establish the presence or absence of a good quality signal for must carry purposes. We believe the videotaping, video playback equipment, television receiver as well as photographic equipment used may interject impairments (e.g., noise, equipment characteristics, color integration, etc.) which could make it difficult to judge whether the

²⁰*In Re Complaint Of Independence Public Media Of Philadelphia, Inc. Against Suburban Cable TV Co.*, CSR-3806 M, PA 1650, at ¶7

videotape or photograph accurately represents the station signal."

In negotiations with satellite carriers in 1995, NASA recommended that the same signal measurement methodology required by the FCC for cable "must carry" purposes be used by broadcasters and satellite carriers in making signal measurements under the SHVA. A variation of that methodology was subsequently incorporated into the inter-industry compliance agreement with Netlink and PrimeStar.²¹ The measurement methodology ultimately agreed upon is based on the methodology specified by the Commission for taking Grade B signal measurements.²²

There can be no better evidence of the appropriateness of the objective Grade B signal standard and that a pragmatic measurement methodology can be applied to implement the standard than the fact two of the three satellite carriers have reached a mutually satisfactory agreement on both issues with the broadcast industry.

PrimeTime 24's Substitution Of Local Commercials

A further indicator that PrimeTime 24 views its network service as something more than a purely supplemental service for unserved households is the extent to which it

²¹NASA will furnish to the Copyright Office a copy of the methodology as soon as a final agreement is signed by the parties.

²²47 C.F.R. §686

substitutes national commercial advertising for local commercial advertising in the non-network programming of its uplinked stations. PrimeTime 24 has entered into contractual arrangements with some of its uplinked network stations by which it strips local commercials from the uplinked station's non-network programming and inserts national commercials in their place. PrimeTime 24 aggressively markets these commercials to national advertisers and shares the advertising revenue from them with the uplinked stations. Attached as Exhibit D is a presentation PrimeTime 24 made to a television station to induce the station to participate in its commercial alteration practice. (The station declined.) It is clear from the presentation that PrimeTime 24 has every incentive to extend the reach of its national advertising--the bigger its national audience, the bigger its national advertising revenues. Thus, while it plainly was not contemplated by Congress when the Act was adopted, PrimeTime 24 has leveraged its statutory license into a dual revenue stream: (1) Revenues from paid subscriptions for its broadcast network service and (2) revenues from national advertisers in the national spot market for its substituted national commercials.

If a national advertiser can reach an affiliate's local viewing audience with the purchase of "spot time" from PrimeTime 24, it will no longer need to purchase time directly from the affiliate in the national spot market. Thus, not only is a local network affiliate harmed by the loss of local viewers and local advertising revenue when PrimeTime 24 provides duplicating broadcast network programming to homes that can receive the same

programming from the affiliate, the affiliate is also harmed by having its national spot advertising revenue siphoned off by PrimeTime 24. Surely, this is not what Congress envisioned when it created a special statutory copyright to enable satellite carriers to provide broadcast network service to a "small percentage" of viewers in "rural America." PrimeTime 24's relentless exploitation of its statutory copyright has made a mockery of the Act and its underlying policy objective.

The Dismantling Of The National Network/Local Affiliate Television Distribution System

The availability of duplicating network programming from distant network stations will, if not checked, undermine the economic base of local network affiliates and, in time, dismantle the network/affiliate distribution system. The rates paid by local advertisers for local commercials--the rates paid by national advertisers for national commercials--and the compensation paid to local affiliates by their networks are, all, a function of the size of each affiliate's local viewing audience. The correlation between a television station's viewing audience and its advertising revenue is direct and immediate. That the importation of duplicating programming will destroy the economic foundation of local broadcast service is a bedrock principle of federal communications regulatory policy. That policy is reflected in the FCC's longstanding network non-duplication and syndicated exclusivity rules for the

cable television industry. See, 47 C.F.R. §§76.92 *et. seq.* and 76.151 *et. seq.* The Commission stated the economic consequences succinctly:

"Diversion imposes economic harm on local broadcasters. . . . A drop of even a single rating point may represent a loss of 1/3 to 1/2 of a broadcaster's potential audience. Audience diversion translates directly into lost revenue for local broadcasters."²³

The economic harm to local affiliates resulting from indiscriminate duplication of network programming by distant network stations is no less a threat from satellites than it is from cable. If permitted to go unchecked, it will cannibalize the national network/local affiliate distribution system and destroy the existing free, over-the-air local television network service. This is self-evident.

Congress Has Preempted Local Restrictions On The Use Of Rooftop Antennas

The Copyright Office invited specific comment on the extent to which local restrictions on the use of rooftop antennas affect the Act's definition of "white areas." Whatever concerns this issue may have caused in the past, they were put to rest by

²³*Report And Order Re Amendment Of Parts 73 And 76 Of The Commission's Rules Relating To Program Exclusivity In The Cable And Broadcast Industries*, 53 FR 27167, 64 RR 1818 (1988) at ¶41. **Note:** This Order contains an exhaustive discussion of the relationship between the cable compulsory license created by the Copyright Act of 1976 and the FCC's broadcast/cable television regulatory policy.

Congress with enactment of the Telecommunications Act of 1996.²⁴ Congress expressly preempted local restrictions on the use of television receiving devices—outdoor antennas and satellite dishes alike. Section 207, titled "Restrictions On Over-The-Air Reception Devices," states:

"Within 180 days after the date of enactment of this Act, the Commission shall, pursuant to Section 303 of the Communications Act, promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct satellite services."

On August 5, 1996, the FCC adopted a *Report And Order* and rule to implement Section 207.²⁵ (See, 47 C.F.R. §1.4000, a copy of which is contained in Exhibit E.) The rule prohibits, *inter alia*, restrictions, including state and local laws and regulations, private covenants and homeowner association rules, that "impair the installation, maintenance or use" of antennas designed to receive television broadcast stations. The test of whether a restriction impairs the installation, maintenance or use of an antenna is whether it

²⁴Pub. L. 104-104, 110 Stat. 56 (1996)

²⁵*Report And Order, Memorandum Opinion And Order, And Further Notice Of Proposed Rulemaking*, IB Docket No. 95-59, CS Docket No. 96-83, FCC Docket No. 96-328, released August 6, 1996

(1) unreasonably delays, prevents or increases the cost of installation, maintenance or use of the antenna, or (2) precludes acceptable reception of television signals.²⁶

The rule creates two exceptions: Restrictions are permissible if necessary for a clearly defined safety objective or to preserve a historic district listed or eligible for listing in the National Register of Historical Places. Local governments or homeowner associations may petition the FCC for a waiver of the rule, but the FCC said waivers will only be granted to applicants who can show "local concerns of a highly specialized or unusual nature." Subsequent case rulings will presumably define the extent to which such showings may be successful.

Thus, it is clear that only in the most extraordinary circumstances may households be denied the use of a rooftop antenna or satellite receiving dish.

It is noteworthy in this connection that a number of satellite carriers are now looking at newly designed antennas to enable them to offer local television stations. DIRECTV recently announced that it has begun to test market a sales strategy including a "high tech, off-air TV antenna" to be sold along with the satellite dish at retail distribution centers in selected cities.²⁷ When attached to the DIRECTV dish, the antenna would allow subscribers to switch with the touch of a button between DIRECTV's satellite service and

²⁶The issue of whether owners of multiple dwelling units such as apartment buildings may impose rules on their tenants' use of dishes and antennas is under consideration by the Commission in a separate phase of the proceeding.

²⁷"Broadcasting and Cable," March 31, 1997, at 59

local off-the-air signals. The marketing plan is labeled the "Yes You Can" campaign and DIRECTV proposes, at least at the outset, to absorb the \$25 - \$50 cost of the antenna.²⁸

Toshiba Corporation has developed a new \$99 antenna it calls the "Big Stick" to allow satellite subscribers to receive local television stations and DBS satellite services in a single package. Several leading consumer electronics and satellite dish dealers, including Radio Shack, will carry the antennas, and United States Satellite Broadcasting will reportedly offer it to their satellite subscribers. The antenna is marketed as an easy-mount antenna that can be readily placed on an exterior wall or roof.²⁹

Therefore, the technology is clearly available to allow satellite customers to receive the best of satellite program services and their local broadcast network affiliates—and Section 207 of the Telecommunications Act of 1996 and 47 C.F.R. §1.4000 now assure that these efforts will not be impaired or frustrated by restrictions that may have previously been imposed by homeowner associations and local governments.

²⁸*Id.*

²⁹"Electronic Media," April 22, 1996, at 22

**Extension Of
The Compulsory License To
Allow Satellite Delivery Of
Local Stations Within Their Local Markets**

At least one satellite company has recently asked Congress to amend Section 119 and extend the compulsory license provided for in that section for delivery of *local* television stations by satellite within their local markets. The proposal would define "local market" as a station's DMA.

The proposal has an obvious surface appeal to affiliates, given the difficulty experienced by affiliates to date with the importation of duplicating distant network stations. However, the proposal raises a number of difficult and complex issues that warrant thoughtful analysis by policy makers, the viewing public and the affected industries.

The proposal, as we understand it, would afford to satellite companies, pursuant to Section 119, the same compulsory copyright privileges afforded to cable television companies under Section 111. It is unclear at this point to what extent satellite carriers would accept and discharge the regulatory burdens that go hand-in-hand with the special copyright privileges Congress afforded to cable systems under Section 111. Hopefully, the satellite industry will provide information and details in that regard in this proceeding.

One thing, however, is clear: Cable's Section 111 compulsory license for the carriage of local stations was linked from the outset with a communications policy regulatory requirement to carry, subject to various requirements, all local television

stations. As the Copyright Office is aware, Section 111's compulsory license for cable systems grew out of a voluntary broadcast/cable industry agreement that required cable carriage of local broadcast stations. That agreement led to Section 111's inclusion in the Copyright Act of 1976:

"Congress was thus aware that there is a close interplay between communications policy and the intellectual property issues addressed in the Copyright Act. . . ."³⁰

Whatever uncertainty may exist about the specific plans of satellite companies to deliver local stations within their local markets, there can be no uncertainty but that any extension of the compulsory license for that purpose must be accompanied by a statutory requirement that all local stations be carried. No rational distinction can be fashioned for exempting satellite carriers from a must carry requirement. The constitutional and public policy rationale for cable's must carry requirement is equally applicable to the satellite industry:

"[I]ncreasing the number of outlets for community self-expression' represents a 'long-established regulatory goal in the field of television broadcasting.' *United States v. Midwest Video Corp.*, *supra*, at 667-668 (plurality opinion). Consistent with this objective, the Cable Act's findings

³⁰*Commission's Rules Relating To Program Exclusivity In The Cable And Broadcast Industries*, *supra* at ¶129

reflect a concern that congressional action was necessary to prevent 'a reduction in the number of media voices available to consumers.' §2(a)(4). Congress identified a specific interest in 'ensuring [the] continuation' of 'the local origination of [broadcast] programming,' §2(a)(10), an interest consistent with its larger purpose of promoting multiple types of media, §2(a)(6), and found must-carry necessary 'to serve the goals' of the original Communications Act of 1934 of 'providing a fair, efficient, and equitable distribution of broadcast services' (§2(a)(9)). In short, Congress enacted must-carry to 'preserve the existing structure of the Nation's broadcast television medium while permitting the concomitant expansion and development of cable television.' 517 U.S., at 652.³¹

NASA believes, in short, that no changes should be made in the copyright statute for extension of the compulsory license to satellite companies unless it is accompanied by a statutory must carry requirement.

It is not clear at this juncture whether a totally symmetrical must carry requirement is necessary for satellite carriers. For example, should satellite carriers that do not propose to carry *any* broadcast signals be subjected to a must carry requirement? Or should only satellite carriers that carry *local broadcast stations within the stations' local markets* be covered? And what should be the carriage requirements, if any, for satellite carriers that carry only distant stations and not local stations?

³¹*Turner Broadcasting System, Inc. v. Federal Communications Commission, Case No. 992, U.S. Supreme Court (Slip Opinion at 8-9) March 31, 1997*

Other regulatory requirements imposed by Congress and the FCC on cable systems are implicated. Among them is the FCC's local broadcast station/cable system cross-ownership rule (47 C.F.R. §76.501). That rule prohibits common ownership of broadcast stations and cable systems within the same market. NASA has long been supportive of the rule believing it essential to assuring competition in local television markets. NASA is inclined to believe, in the absence of evidence to the contrary, that the policy rationale underlying that rule is equally applicable to satellite carriers.

Wholly apart from these rules, NASA is concerned about the extent to which local affiliates would have the ability to monitor and enforce compliance by satellite carriers with the statutory license. The problems encountered with the deceptive marketing practices and illegal carriage of distant network stations are discomfoting. Extension of the satellite industry's compulsory license for carriage of local stations must be accompanied by meaningful statutory provisions that would enable networks and their affiliates to readily monitor compliance and give them and their networks the right to enforce the limitations of the statutory license. A detailed and "easy to enforce" reporting system should be enacted. Infringement should be subject to the same penalties as provided for cable companies under Section 111.

Finally, to the extent any change is made in Section 119's definition of "local market" for purposes of carriage of local stations, care should be taken to assure that the change does not adversely affect the "pattern and practice" remedies provided for in Section

119. The 1994 amendment defined "local market" as a station's predicted Grade B contour for purposes of proving that violations constitute a "pattern and practice." No change in the definition of "local market" should be made as that term applies to a "pattern and practice" of violations.

Given the special concerns applicable to in-market carriage of local stations, NASA recommends that any change in the statute for this purpose be placed in an altogether new section. In-market satellite carriage of local stations has implications that are not fully addressed by Section 111 or Section 119.

Conclusion

NASA looks forward to the comments to be filed by other parties in this proceeding and to the hearings scheduled for next month. NASA will continue to review and evaluate these issues and submit specific policy recommendations upon conclusion of its review.

April 28, 1997

Respectfully submitted,

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EXHIBIT A

**NASA'S 1991 PROPOSED
COMPLIANCE AND ENFORCEMENT PROGRAM
(Submitted to PrimeTime 24 in June 1991)**

AN ANALYSIS OF
PRIMETIME 24'S FAILURE TO COMPLY
WITH THE HOME SATELLITE VIEWING ACT
AND RECOMMENDED SOLUTIONS

I.
Advertising And Promotion

A. The Problem

PrimeTime 24's advertising and promotional materials fail to disclose adequately the statutory eligibility requirements for satellite service. The advertisement in Attachment 1 which is used by PrimeTime 24 is illustrative. It states:

"PrimeTime 24 is available in all areas where network channels are not clearly received."

That statement is misleading in that (a) it fails to disclose that satellite service is available only for private home viewing; (b) it suggests that the inability to receive all three network signals will qualify a subscriber for satellite delivery of one or more network signals; and (c) it fails to disclose that even though a specific local network affiliate may not be clearly received off-the-air, satellite service is not available if the subscriber received that network signal by cable within the preceding 90 days.

B. Recommendation

PrimeTime 24 should include in each advertisement a simple statement summarizing the eligibility requirements. For example, the inclusion of the following in each promotional advertisement would suffice:

"PrimeTime 24 provides satellite service of ABC, CBS and NBC programming only for private home viewing. Service of any one of these network signals may be made available only to those homes that (a) cannot receive that network from a local station off-the-air with a conventional rooftop antenna and (b) have not received that network by cable television within 90 days before satellite service begins."

II.

Subscriber Pre-Screening Procedures Used By PrimeTime 24's Customer Service Representatives

A. The Problem

PrimeTime 24's customer service representatives ("CSRs") fail to fully inform potential subscribers of the statutory service eligibility requirements. Affiliates of all three networks routinely report the existence of subscribers well within their Grade B and Grade A contours, some of whom are located within sight of their towers and for whom there are no terrain or other obstructions to impair reception. A telephone call to PrimeTime 24's 800 service number will confirm the inadequacy of its subscriber pre-screening procedures.

A portion of the script used by PrimeTime 24's CSRs appears in Attachment 2. The script is deficient in several respects: (a) it fails to inquire whether the service will be used for private home viewing; (b) it does not inquire into the adequacy of over-the-air service from each network, separately, and therefore is destined to create confusion among subscribers about their eligibility to receive a particular network; and (c) it cleverly, but deceptively, glosses over the signal reception requirement.

B. Recommendation

When service inquiries are received, PrimeTime 24's CSRs should inform potential subscribers of all the statutory service eligibility requirements in clear, concise terms. The script which appears in Attachment 3 is recommended.

In light of the experience to date with telephone screening, prospective subscribers should be compelled to apply for service in writing on a prescribed questionnaire which both recites the statutory restrictions on eligibility and assures that the pertinent data is obtained up front. In addition to the obvious points, the questionnaire should include such matters as whether the applicant has a functioning over-the-air antenna as well as a dish; what impediments to the over-the-air reception the applicant is aware of; whether the residence has subscribed to cable television within the preceding 90 days; where the applicant's dish is or will be located (with specific address information); whether the dish is intended to be used by the same party who is executing the application; and whether the dish is to be used for private home viewing or in a

commercial establishment. Executed questionnaires should be furnished to the pertinent local affiliate before the service is connected.

III. Inadequate Identification Of The Location Of The Dish

A. The Problem

PrimeTime 24 has refused to provide the networks and their affiliates with the "names" of subscribers, arguing that the Act does not require it. While Section 119(a) of the Act does not require that the names of subscribers be furnished, both the House Judiciary and Commerce Committee Reports accompanying the Act do. Both Reports state that the Act requires the "names" of subscribers to be furnished to the networks. [See, H.R. Rep. No. 887, 100th Cong., 2d Sess., part 1, at 18 and part 2, at 20 (1988).] PrimeTime 24's failure to include the names of its subscribers makes it impossible for local stations to determine without making a door-to-door check whether the subscriber is a commercial establishment or a private residence and is expressly at odds with the intent of Congress as stated in the House Judiciary and Commerce Committee's Reports.

Moreover, PrimeTime 24 has in the past identified urban subscribers by post office box rather than by "street address." Section 119(a)(2)(c) of the Act requires that subscribers be identified by "street address," "county" and "zip code." PrimeTime 24 promised one of the networks (ABC) in May 1990, that in the future it would supply

the networks and affiliates with the street addresses of its subscribers, not post office box numbers. PrimeTime 24, however, has not agreed to go back and correct its earlier subscriber lists.

Affiliates have also encountered difficulty in locating rural subscribers who are identified by an RFD number. PrimeTime 24 has refused to supply along with the RFD number any descriptive information (e.g., "located 5 miles from Centerville on Highway 24"). While the statute does not require descriptive information (PrimeTime 24 claims that if the post office department can locate these people, local affiliates can), PrimeTime 24's CSRs could easily obtain such information from a rural subscriber at the time service is requested. This information could, of course, easily be incorporated into the subscriber lists furnished by PrimeTime 24 to the networks.

B. Recommendation

First, PrimeTime 24 should furnish the name of each subscriber, along with the address. Second, the address for each urban subscriber should be a street address, not a post office box. Third, when an RFD address is provided for a rural subscriber, PrimeTime 24 should obtain and furnish brief descriptive address information. Fourth, PrimeTime 24 should go back and correct the deficiencies in this regard for all subscriber lists submitted earlier.

IV.
Investigation And Verification Procedures

A. The Problem

Attachment 4 contains the letter and questionnaire PrimeTime 24 now sends to each subscriber when the subscriber's service eligibility is challenged by a local affiliate. The letter and questionnaire represent a significant improvement over the procedure PrimeTime 24 formerly used. Unfortunately, it is not clear whether PrimeTime 24 plans to go back to subscribers previously challenged to furnish them with this new letter and questionnaire.

PrimeTime 24 has not been willing to furnish affiliates (or their networks) copies of the completed questionnaires received from subscribers who have been challenged or the names and addresses of challenged subscribers who fail to respond to the questionnaire.

The Report of the House Judiciary Committee accompanying the Satellite Home Viewer Act clearly requires satellite carriers to furnish this information. It states:

"[T]he carrier [should be] . . . reasonably diligent in avoiding and correcting violations through an internal compliance program that includes methods of confirmation of household eligibility such as customer questionnaires, sample site signal measurements, and periodic audits, all of which must be served upon each network, which may utilize such information or share it with others solely to monitor the distributor's compliance with the statute." [H.R. Rep. No. 887, 100th Cong., 2d Sess., part 1, at 19 (1988).] [Underlining supplied.]

Not only has PrimeTime 24 refused to provide the networks with its audit materials, it has acknowledged that it does not attempt to confirm and verify the eligibility of every subscriber challenged by affiliates. Instead, it only checks a "random sample" of the challenged subscribers, a process that is obviously at odds with the statute.

Moreover, where a challenged subscriber is asked to confirm his eligibility and fails to complete and return the questionnaire, PrimeTime 24 "assumes" the subscriber to be qualified and does not follow up nor does it discontinue service to that subscriber.

Finally, it does not appear that PrimeTime 24 undertakes any "site measurements" as the House Judiciary Committee Report expressly contemplates.

Plainly, PrimeTime 24's verification and audit procedures do not comport with the statutory requirements.

B. Recommendation

PrimeTime 24 should

- (a) Send all subscribers whose eligibility has at any time been challenged the current version of the letter and questionnaire which are now used to confirm subscriber eligibility.
- (b) Promptly furnish to the appropriate local affiliate a copy of the questionnaire after it has been completed and returned by each challenged subscriber.

- (c) Promptly furnish to the appropriate local affiliate the name and address of each challenged subscriber who fails to respond to the questionnaire within 30 days. If a subscriber fails to respond within 30 days, PrimeTime 24 should promptly terminate the service.
- (d) Promptly furnish to the appropriate local affiliate the name and address of each challenged subscriber whose service is disconnected and the name and address of each challenged subscriber whose service is not disconnected.
- (e) Discontinue its "random sampling" of challenged subscribers. PrimeTime 24 should send every subscriber who is challenged by an affiliate a letter which advises him of the challenge and request him to return the completed questionnaire.
- (f) Finally, the House Judiciary Committee Report contemplates that satellite carriers will conduct "sample site measurements" to confirm the eligibility of subscribers. There is no indication that PrimeTime 24 has ever undertaken "site measurements."

**V.
Grandfathered Subscribers**

A. The Problem

Notwithstanding the exchange of correspondence and discussions with PrimeTime 24 by all three networks, confusion continues to exist as to those subscribers who qualified for grandfathering status.

B. Recommendation

PrimeTime 24 should furnish the appropriate network the names of all grandfathered subscribers receiving that network's service with the date on which the subscriber began to receive the service. The name and date will serve to confirm and verify the eligibility of each subscriber for grandfathered status and whether the service is being used for private home viewing.

**VI.
Physical Form Of
Subscriber List Materials**

A. The Problem

The physical form of the subscriber lists is inadequate. The networks and their affiliates would like to use an electronic scanner to convert PrimeTime 24's hard copy to electronic data. However, because of the form in which it is submitted, much of the

data furnished by PrimeTime 24 cannot be scanned. The material, more often than not, consists of

- * "Dirty" photocopies of green bar paper or photocopies with streaks, blurs and other markings and often in letters too pale to read, much less scan by electronic means. Some look like fourth or fifth generation copies;
- * Photocopies consisting of two pieces of paper cut and pasted and copied onto a single page and irregular in form;
- * Reports written in hand or when typed, in "mouse print" type too small to read; and
- * Reports prepared in different formats on different sized paper.

B. Recommendation

PrimeTime 24 should furnish the material in a form that will permit it to be electronically scanned.

VII.

PrimeTime 24's Enforcement And Follow-Up Procedures

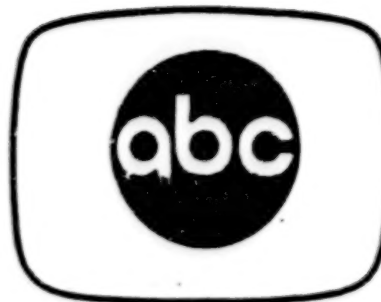
A. The Problem

As noted earlier, uncertainty and confusion exists among the networks and their affiliates over what actually happens once a subscriber is challenged. The feeling is that an affiliate's challenge, once made, often falls in a "black hole" and nothing happens. Affiliates need to know whether a challenge is accepted or rejected and if rejected, why.

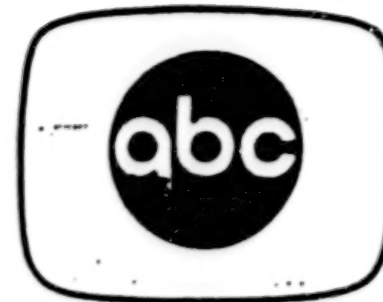
B. Recommendation

As suggested earlier, PrimeTime 24 should supplement its periodic addition and deletion lists by furnishing to each local affiliate a response to each challenged subscriber. The response should indicate whether the subscriber was disconnected and if so, the date of the disconnection, and if not, why the challenge was rejected.

* * *



ABC



**ABC
IMPROVED**

Only PrimeTime 24 delivers prime stations from prime locations. PrimeTime 24 broadcasts WABC-New York straight from the Big Apple, delivering your favorite programs at convenient Eastern/Central prime times. You'll enjoy prime time programs, the most popular game shows, talk shows, sports and local news. Set yourself up for complete, uninterrupted programming of ABC... improved.



Prime Stations. Prime Locations.

WMA ABC-Atlanta, WABC (ABC-New York),
WBBM CBS-Chicago.

1-800-248-2844

PrimeTime 24 is available in all areas where network channels are not clearly received. PrimeTime 24 is a service mark of PrimeTime 24 Joint Venture.
© 1990 PrimeTime 24 Joint Venture.

ATTACHMENT 1

354

CSR SCRIPTS

<<Answer the phone by the second ring!>>

"Good morning <afternoon, evening>
Thank you for calling PrimeTime 24.
My name is _____.
How may I help you?"

If a customer wants information:

"PrimeTime 24 is a package of ABC, CBS, and NBC superstations for home satellite dish owners. It brings you ABC from New York (that's WABC), CBS from Chicago (that's WBEM), and NBC from Atlanta (that's WYIA). You'll get all the network programming like 'The Bill Cosby Show', '60 Minutes', and 'Moonlighting', plus great syndicated shows such as 'Wheel of Fortune', 'Oprah Winfrey', and 'The People's Court'. All three channels are in stereo on satellite F2, and the subscription rates are \$49.95 for one year, \$90 for two years, or \$130 for three years."

If a customer wants to order service:

1. Ask, "Do you have a VideoCipher II descrambler?"

If YES:

"Have you had a subscription to cable television in the last three months?"

If NO:

"I'm sorry but we cannot install you without one."

If NO:

"Without your dish, can you receive a clear channel from ABC, CBS, or NBC?"

If YES, say,

"I'm sorry, but we cannot authorize your subscription to PrimeTime 24."

If YES:

If NO,

install all three channels. Proceed to the next page.

"Which channels can you get without your dish?"

You can install the customer for any channel which he cannot get. Proceed to the next page.

2. Ask, "Have you ever had any of our services before?"

If NO, then install him as follows:

If YES, go to the next page.

- Go to the Main Menu.
- Type "1" and press "enter".
- Type in the information, including the physical address of the dish, not the mailing address:

Include a comma
and a space be-
tween the names.

This field only
accepts numbers.

Optional

The customer can
get this number by
pressing "SET-UP" &
"1" while on a scram-
bled station.

Subscriber Name: Doe, John
House #: 77 /
Street: Sunset Strip Apt: 2
City: Los Angeles
State: CA Zip: 90064
Phone: 213-555-1234
Agent #:
Descrambler #: 01845BEFFF8A

- Press "enter".
- Press "enter".
 - This is the "CR" screen. You may choose to make a notation here before you press "Enter". If you do, then an asterisk ("*") must be placed after the name of the customer (using the "CM" screen -- see pg 14).
- Type "I" under the appropriate service code.
 - Subscriber service codes are listed on page 11.
- Go to Step 3 on page 10.

Recommended Customer Service Representative Script

Federal law permits the satellite delivery of each network broadcast signal only for private home viewing. By law, a network's signal may be delivered by satellite only to a home that cannot receive that signal with a conventional rooftop antenna from a local station and which has not received that network's signal by cable within the last 90 days. In connection with this requirement, I am going to ask you several questions to make sure your satellite dish qualifies for the network service you desire:

1. First, do you use your satellite dish for private home viewing?

_____ Yes _____ No

Comment: If the answer is no, the potential subscriber is ineligible by law to receive any broadcast network service. If the answer is yes, then the following additional questions should be asked.

2. Do you now or have you in the past had a conventional outdoor rooftop antenna installed and working at the address where your satellite dish is located?

_____ Yes _____ No

Comment: If the answer is no, then the potential subscriber, in all probability, is ineligible because under Section 119(d)(10) of the Act, an "unserved household" is one that cannot receive a measured Grade B with a "conventional outdoor rooftop antenna." If the answer is yes, then the following should be asked, separately, as to each of the ABC, CBS and NBC Networks.

3. Using the rooftop antenna, are you able to receive an adequate ABC Network signal which is substantially free of interference?

_____ Yes

_____ No

Comment: If the answer is yes, then the potential subscriber is ineligible by law to receive that network, and the CSR should then ask the question (again, separately) as to CBS and NBC Network service.

4. What is the specific problem you are having?

Comment: This will help in verifying the subscriber's eligibility.

5. What, in your opinion, is the reason you cannot receive an adequate ABC Network signal?

Comment: The CSR may discover that the antenna is not working or that it has been disconnected, or that a defect in the subscriber's channel selector switch is the cause of the reception difficulty.



342 Madison Avenue Suite 1520 New York, NY 10173
(212) 599-4440 Fax: (212) 599-2402

Dear Subscriber:

Because ABC has questioned your eligibility to receive WABC (ABC) as part of your PrimeTime 24 subscription, PrimeTime 24 is required to ask you to verify your eligibility in writing. Please take a few minutes to read through the eligibility requirements and send back the enclosed card within ten (10) days.

Under the Satellite Home Viewer Act of 1988, our customers may purchase subscriptions to ABC or other network programming via satellite, provided that they meet some eligibility rules: (1) the household where the dish is located cannot have subscribed to cable service within a period of 90 days prior to the household's satellite subscription and (2) the household is unable to receive an acceptable over-the-air signal from an ABC-affiliated television station.

An acceptable over-the-air signal means a television picture that is free of "snow", "ghosting" and other objectionable interference when viewed without a dish through a typical rooftop antenna.

Please return a signed copy of the enclosed eligibility verification card within ten (10) days. If we do not receive it, your service may be interrupted.

Thank you for your cooperation.

1. We did not have a subscription to cable television in this household within 90 days before we subscribed to PrimeTime 24.
2. We do not receive an acceptable over-the-air ABC signal with a typical rooftop antenna as a result of: ghosting _____, snow _____, other interference _____ (check one or more as applicable). If other interference applies, please describe: _____

If your household does not presently have a conventional rooftop antenna, please answer the above based on your past experience with a rooftop antenna at your household location.

3. My PrimeTime 24 subscription is solely for personal use within my household.
4. I represent that the above statements are true and correct.



Name _____ (please print)

Signature _____ Date _____

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If the address on this card is a P.O. Box without a rural route number, ABC would also like a description of the location of your household. That description will enable ABC to complete its view of your reception at your household. Please provide it in the following space:

Code # _____ Account # _____

Date of Subscription _____

EXHIBIT B

PRIMETIME 24 ADS

Boxing

1999

[illegible]

7:30p Prime Champ. Series #773 GL, 25.
8:00p Prime Champ. Series #888F PL, 6.
#888 GL, 21.
9:00p Bowling #89F GL, 9 Zail
#89F GL, 21.
7:30p Prime Champ. Series #898F PL, 4.
Ray Jones Jr. vs. Vinny Pastorek #89F
GL, 6.
8:00p Bowling #90F GL, 16.
#90F GL, 21.
11:00p Fight Night at the Great Western For-
um #91, 9 #91 #91F PL, 6 #91
#91F PL, 11 #91 #91F PL, 7 #91
#91F GL, 11 #91 #91F GL, 21 #91
#91F GL, 16 #91 #91F PL, 24 #91
11:30p Fight Night at the Great Western For-
um #92F PL, 16 #92F-#97.
12:00a Fight Night at the Great Western For-
um #98, 16 #98F-#97.
3:00a Fight Night at the Great Western For-
um #99F PL, 16.
#99F GL, 21.
9:00p Bowling #100F GL, 16 Zail
#100F GL, 21.
12:00a Bowling #100F-#97 GL, 21.
4:00a Prime Champ. Series #100 PL, 16.
#100 GL, 21.
7:00p Fight Night at the Great Western For-
um #101F PL, 22.
11:30p Fight Night at the Great Western For-
um #102F PL, 12.
#102F GL, 21.
9:00p Bowling #102F GL, 9 Zail
#102F GL, 21.
8:00p Bowling #103F GL, 16.
10:00p Ray Jones Jr. vs. Tony Thornton
#104F GL, 16 #104F-#97 GL, 6 #104F

Amateur

4.00s Champ FWS Pl. 18.
3.00s Champ FWS Pl. 18.
4.00s Champ FWS Pl. 18.
3.00s Champ FWS Pl. 18.
2.00s Champ FWS Pl. 18.
4.00s Champ FWS Pl. 18.
3.00s Champ FWS Pl. 18.
2.00s Champ FWS Pl. 18.
3.00s Champ FWS Pl. 18.

Boxing Mac.

2:30p Main Event PW FL 16.
 12:30a World Toughman Competition -- Mid
 west Regional PW FL 16.
 2:30p Main Event PW FL 16.
 2:30p Main Event PW FL 16.
 2:30p Main Event PW FL 16.
 2:30p Main Event PW FL 16.
 11:30p Main Event PW FL 16.
 2:30p Main Event PW FL 16.
 8:00p World Toughman Competition -- SW
 Champ. GSW FL 16.
 11:00p World Toughman Competition --
 Southeastern Regional SW FL 16.
 11:30p Main Event PW FL 16.
 2:30p Main Event PW FL 16.
 2:30p Main Event PW FL 16.
 2:30p Main Event PW FL 16.
 2:30p Main Event PW FL 16.



**ALL THE FOOTBALL
YOU NEED IS ON
PRIMETIME 24.**

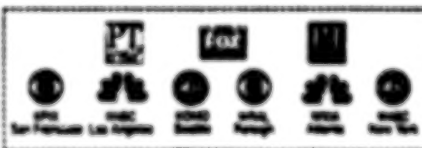
If you love football, you'll get a big kick out of PrimeTime 24's fall schedule. We have enough games and excitement to satisfy even the die-hard fan. Including:

- Over 100 games on PT East, PT West and FOX!
- The only place you can get all 10 playoff games.
- The only place you get SuperBowl XXX!
- Monday night football.
- Thanksgiving Day Games.
- Late-Season Saturday double headers.

Plus your favorite network programming from 7 major cities: movies, drama, comedy and news...with a choice of Eastern *and* Pacific viewing times so you never miss a show. All in a single, complete network package.

PrimeTime 24-Your network *and* football connection.
Call one of our packagers or order directly from us:

1-800-883-PT24



See all the action
on S4, G4.



**America's Network Connection.
Come to Come.**

AIC, CBS, NBC, and FOX Channels are available only for homes (1) which cannot receive an acceptable picture from local AIC, CBS, NBC, and FOX affiliates via a commercial rooftop antenna, and (2) which have not subscribed to cable television within the last 90 days.

DO YOUR CUSTOMERS KNOW
THEY CAN GET THE NETWORKS
ON THEIR DBS SYSTEM?



DO YOU?

PRIME TIME 24—THE CONNECTION TO THE NETWORKS

Don't miss out on a big DBS sale because you're unsure about the programming. Network television is a top programming concern with potential DBS dish customers and now you can tell them with confidence that it's available to them if they qualify. With Prime Time 24's network affiliates, your DBS customers won't miss one minute of their favorite prime time programs, daytime soaps, evening news and seasonal sports on East and West Coast feeds.

They'll get great regional variety from 6 great network affiliates: KOMO - ABC Seattle, KPX - CBS San Francisco, KNBC - NBC Los Angeles, WNBC - NBC New York, WJLA - ABC Washington, D.C. and WRAL - CBS Raleigh, plus FOX NFL, the national FOX signal. And they'll enjoy the convenience of both Eastern and Pacific viewing times.

Close more sales. Let your customers know about Prime Time 24. We're America's Network Connection. On the Coast.



For more information call
DIRECTV at 1.800.323.1994
DISH Network at 1.800.521.9282 or
AlphaStar at 1.888.YOURSTAR



"It's a deal."
You'll watch *Frasier* at nine and I'll watch
Home Improvement at twelve."

"With PT East and PT West
it's simple."



PRIME TIME 24 BRINGING EAST AND WEST TOGETHER LIKE NO ONE ELSE.

Watch *Frasier* on Eastern/Central time.



&



Watch *Home Improvement* on Pacific time.

Great things happen when East and West work together and PrimeTime 24 proves it, with our PT East/PT West combo. And now PrimeTime 24 is the only provider of programming on Eastern/Central time and Pacific time. If you qualify*, you'll get your favorite prime time shows like *Frasier* and *Home Improvement*, twice a night, at two different times, so you can "time shift."

Plus you get these other great combo benefits:

- 5 Great cities on two coasts—New York, Los Angeles, San Francisco, Seattle and Raleigh.
- More sports—the NBA and college basketball from both coasts.

- More syndicated shows, soaps and talk shows to choose from.
- Crystal clear signal and our commitment to preemption-free network programming.

SAVE 24%

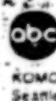
**ADD PT WEST TO PT EAST OR
PT EAST TO PT WEST NOW!**

CALL US AT

1-800-883-PT24.

Or call any of the many distributors who carry PT East and PT West in their packages for other special prices!

*ABC, CBS, NBC and FOX Channels are only available: (1) for private home viewing; (2) to households that cannot receive an acceptable off-air picture with the use of a conventional rooftop antenna; and (3) in households that have not received that network by cable television within the last 90 days.



PRIME
TIME

America's Network Connection
AOL To Go

EXHIBIT C

**LETTER SENT BY
PRIMETIME 24 TO ITS SUBSCRIBERS**



153 East 53rd Street 59th Floor New York, New York 10022

Dear Subscriber:

You may be about to lose some or all of your favorite satellite-delivered network programming—shows like Seinfeld, ER or Monday Night Football.

Under a law known as the Satellite Home Viewer Act, many local network stations across the country are demanding that PrimeTime 24 terminate satellite-delivered network programming. They may soon contend that you receive an "acceptable signal" from your local network station, and thus are ineligible for service.

These local network station(s) want to terminate service based upon a complex technical standard in the law—not based upon the quality of the picture on your TV set. And you can't prove whether you meet this standard without expensive scientific equipment!

Sound crazy? It is!

Shouldn't the law focus on the quality of the picture you receive?

As your satellite programmer, PrimeTime 24 would like to provide you with a full range of your favorite network programming. However, we need your help to ensure that big broadcast interests don't undermine your ability to watch your most valued TV shows.

HOW CAN YOU FIGHT THIS DECISION TO TERMINATE YOUR SATELLITE-DELIVERED NETWORK SERVICES?

- Call toll free 1-888-SAVE MY TV (1-888-722-3676) and write your local members of Congress. Ask them to change the law governing satellite-delivered network television and television picture quality. Tell them people deserve access to satellite network television if they have a "poor quality picture," not if their television signal meets some technical legal standard.
- Tell them you don't want to lose the ability to see programs like Seinfeld, ER, or Monday Night Football. Ask Congress to establish a standard that makes sense. The broadcast industry has the cards stacked against you. Let's change the law so that your local network stations can't unjustly cause the termination of your satellite network programming.

The networks and their affiliates are launching an aggressive effort to block reception of satellite network television.

Let's not turn back the clock to the days of poor quality reception and limited consumer choice.

We need your immediate help in this effort. If you wish to retain all of your satellite-delivered network services, Congress needs to hear from you now.

Please call toll free 1-888-SAVE MY TV (1-888-728-3698) to find out how you can help change the current law. Thanks for your assistance and support in this effort.

Sincerely,

A handwritten signature in cursive script that reads "Sid Amira".

Sid Amira
Chairman & CEO

EXHIBIT D

**PRESENTATION BY PRIMETIME 24
IN SUPPORT OF
ITS COMMERCIAL ALTERATION PRACTICE**



Presentation To

153 East 53rd Street
Suite 2500
New York, New York 10022
212-754-3320

Karen S. Thady
President

The Contour of signal



is about to change!



**How your station can be uplinked,
thus attaining superstation status
and creating new revenue streams**



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PAGE

PrimeTime 24 was formed in 1986 to provide TV's most popular programming to a surprising number of households in mostly rural areas unable to receive clear network signals, informally called "white areas."

PrimeTime 24 uplinks three affiliate signals to the F2 satellite, channels 2, 4, and 12, and scrambles them using General Instrument's VC II Plus technology that has the ability to authorize subscribers instantly.

PrimeTime 24 Commands a Vital Segment Of The Home Satellite Market

- **Over 1.7 million households own satellite dish systems with VCI Plus descramblers.**
- **77% subscribe to network television -- 1.3 million.**
- **Close to two-thirds enjoy PrimeTime 24 -- 855,000 subscribers.**

What PrimeTime 24 Supplies



WABC, New York City, the number-one station in the number-one television market. Owned and operated by Cap Cities/ABC.



WXIA, Atlanta, CBS Affiliate, owned by Gannett Broadcasting, one of the largest broadcast station owners.



WRAL, Raleigh, NC, NBC Affiliate owned by Capital Broadcasting, the number-one station in one of the fastest growing regions in the country.

What Our Subscribers and Potentially Many Other Households Will Also Receive This Fall

Three West Coast Stations Transmitting

↪ **ABC**

↪ **CBS**

↪ **NBC**

↪ **and Fox, *the fourth network.***

The Leading Provider Of Network Television, PrimeTime 24 Is Distributed Nationwide Through...

➔ **26 well-known programmers and packagers, including:**

- HBO
- Showtime
- United Video
- Turner Broadcasting
- Cox
- Jones

serving more than 855,000 satellite subscribers

➔ **200 US cable systems serving over 349,000 customers**

➔ **Nearly 20 cable systems in Central America and the non-US Caribbean serving close to 200,000 subscribers**

➔ **DirecTv launching now and expected to garner up to 10 million customers in the next five years of which PrimeTime 24 channels will have some share**

PrimeTime 24 Subscribers Are Demographically Desirable To Key Advertisers

- **Middle-aged, affluent homeowners are especially prized by consumer electronics and automotive advertisers and direct marketers of all kinds.**

PrimeTime 24 proposes to create a joint venture with your station for the sale of all your advertising time on satellite feed.

PrimeTime 24 Will Launch An Advertising Sales Program On Behalf of Six Channels

By packaging the audience delivery of each station to advertisers, we make the whole more attractive to potential advertisers than any of the parts alone.

Efficiency:

- One sales organization
- Central traffic
- Central administration
- Central billing
- One sales overhead

PrimeTime 24 will manage these sales responsibilities and also manage all traffic and billing functions and provide assistance in organizing the technical aspects of this joint venture.

How Your Station and PrimeTime 24 Will Share In This Venture

The Deal

- All advertiser sales revenues to be allocated on weighted pro-rata share of audience delivery (as measured by Nielsen coinidentals)
- Station specific advertiser sales to be credited to that station.
- Your station and PrimeTime 24 to share 50/50 in all net profits.
- Allocation of proceeds:
 - Venture to pay third-party sales commission and management fee.
 - Station to be paid its out-of-pocket operating costs.
 - Balance to be shared 50% to your station and 50% to PrimeTime 24.

Estimated Station Costs

<u>One-Time Capital Expense</u>	\$100,000
----------------------------------------	------------------

Purchase or reallocation
of insertion equipment

<u>Annual Operating Expenses</u>	\$125,000
-----------------------------------------	------------------

Technical (insertion)	\$ 65,000
-----------------------	-----------

General, Administration	\$ 60,000
-------------------------	-----------

Separate feed for uplink	<u>\$ 72,000</u>
--------------------------	-------------------------

	\$197,000
--	------------------

Projected West Coast Subscriber Growth







	<u>Subscribers</u>
Year 1	200,000 - 300,000*
Year 2	325,000 - 450,000*
Year 3	400,000 - 700,000*

**Depending on DirecTv, cable, and non-US subs.*

Estimated Gross Advertiser Sales Revenues

Year 1	\$ 500,000 to 900,000
Year 2	\$ 812,000 to 1,350,000
Year 3	\$1,000,000 to 2,100,000

Benefits To Your Station

-  Attain superstation status, making your signal available throughout the US and beyond.
-  Create a new, separate profit-contributing revenue stream.
-  Become a major player in the burgeoning home satellite industry.
-  Generate additional revenue from your uplink facility in fees charged to PrimeTime 24.*
-  Share copyright fees.*
-  Station savings from allocation of personnel and overhead to satellite operation.

**Where applicable.*

EXHIBIT E

**THE FCC'S ANTENNA RULE
47 C.F.R. §1.4000**

§ 1.4000. Restrictions impairing reception of Television Broadcast Signals. Direct Broadcast Satellite Services or Multichannel Multipoint Distribution Services

(a) Any restriction, including but not limited to any state or local law or regulation, including zoning, land-use, or building regulation, or any private covenant, homeowners' association rule or similar restriction on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership interest in the property, that impairs the installation, maintenance, or use of:

(1) an antenna that is designed to receive direct broadcast satellite service, including direct-to-home satellite services, that is one meter or less in diameter or is located in Alaska; or

(2) an antenna that is designed to receive video programming services via multipoint distribution services, including multichannel multipoint distribution services, instructional television fixed services, and local multipoint distribution services, and that is one meter or less in diameter or diagonal measurement; or

(3) an antenna that is designed to receive television broadcast signals,

is prohibited, to the extent it so impairs, subject to paragraph (b). For purposes of this rule, a law, regulation or restriction impairs installation, maintenance or use of an antenna if it: (1) unreasonably delays or prevents installation, maintenance or use, (2) unreasonably increases the cost of installation, maintenance or use, or (3) precludes reception of an acceptable quality signal. No civil, criminal, administrative, or other legal action of any kind shall be taken to enforce any restriction or regulation prohibited by this rule except pursuant to paragraph (c) or (d). No fine or other penalties shall accrue against an antenna user while a proceeding is pending to determine the validity of any restriction.

(b) Any restriction otherwise prohibited by paragraph (a) is permitted if:

(1) it is necessary to accomplish a clearly defined safety objective that is either stated in the text, preamble or legislative history of the restriction or described as applying to that restriction in a document that is readily available to antenna users, and would be applied to the extent practicable in a non-discriminatory manner to other appurtenances, devices, or fixtures that are comparable in size, weight and appearance to these antennas and to which local regulation would normally apply; or

(2) it is necessary to preserve an historic district listed or eligible for listing in the National Register of Historic Places, as set forth in the National Historic Preservation Act of 1966, as amended, 16 U.S.C. § 470a, and imposes no greater restrictions on antennas covered by this rule than are imposed on the installation, maintenance or use of other modern appurtenances, devices or fixtures that are comparable in size, weight, and appearance to these antennas; and

(3) it is no more burdensome to affected antenna users than is necessary to achieve the objectives described above.

(c) Local governments or associations may apply to the Commission for a waiver of this rule under Section 1.3 of the Commission's rules, 47 C.F.R. § 1.3. Waiver requests will be put on public notice. The Commission may grant a waiver upon a showing by the applicant of local concerns of a highly specialized or unusual nature. No petition for waiver shall be considered unless it specifies the restriction at issue. Waivers granted in accordance with this section shall not apply to restrictions amended or enacted after the waiver is granted. Any responsive pleadings must be served on all parties and filed within 30 days after release of a public notice that such petition has been filed. Any replies must be filed within 15 days thereafter.

(d) Parties may petition the Commission for a declaratory ruling under Section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, or a court of competent jurisdiction, to determine whether a particular restriction is permissible or prohibited under this rule. Petitions to the Commission will be put on public notice. Any responsive pleadings must be served on all parties and filed within 30 days after release of a public notice that such petition has been filed. Any replies must be filed within 15 days thereafter.

(e) In any Commission proceeding regarding the scope or interpretation of any provision of this section, the burden of demonstrating that a particular governmental or nongovernmental restriction complies with this section and does not impair the installation, maintenance or use of devices designed for over-the-air reception of video programming services shall be on the party that seeks to impose or maintain the restriction.

(f) All allegations of fact contained in petitions and related pleadings before the Commission must be supported by affidavit of a person or persons with actual knowledge thereof. An original and two copies of all petitions and pleadings should be addressed to the Secretary, Federal Communications Commission, 1919 M St. N.W.; Washington, D.C. 20554. Copies of the petitions and related pleadings will be available for public inspection in the Cable Reference Room in Washington, D.C. Copies will be available for purchase from the Commission's contract copy center, and Commission decisions will be available on the Internet.

ORIGINAL

**GENERAL COUNSEL
OF COPYRIGHT**

APR 28 1997

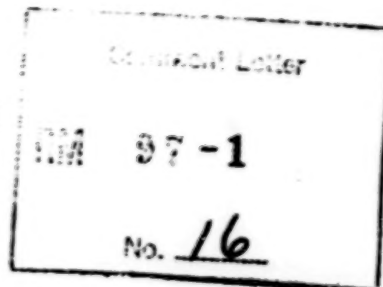
Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C. 20540

RECEIVED

In the Matter of)

Revision of the Cable and)
Satellite Carrier)
Compulsory Licenses)

Docket No. 97-1



**COMMENTS OF
THE NATIONAL FOOTBALL LEAGUE**

The National Football League (hereinafter "NFL" or "League") hereby submits its Comments in Copyright Office Docket No. 97-1, which addresses possible changes in the copyright licensing of broadcast retransmissions.^{1/}

The NFL's Interest in the Proceeding

The League holds the copyright in the telecasts of all Sunday afternoon NFL games. The Copyright Act grants the League, as copyright holder, the right to determine how those telecasts will be distributed. Because compulsory licenses qualify the League's general right under copyright law to create and implement a distribution plan for its televised entertainment product, the scope of such licenses and the statutory limits that govern their implementation are of concern to the League.

The Office has raised a number of questions dealing with both the cable and satellite carrier compulsory licenses. The League's Comments, however, are limited to the Section 119 satellite carrier compulsory license, which raises issues that are unique to the NFL and other sports leagues that have regionalized network television plans.^{2/}

^{1/} See 62 Fed. Reg. 13396 (March 20, 1997) (the "Notice").

^{2/} The NFL also licenses telecasts of Monday Night Football and other games on a nationwide basis. These Comments focus on Sunday afternoon games because Section 119 satellite distribution (as actually implemented by Prime Time 24 and other carriers) disrupts the regionalized television plan that the League uses for such games, but does not have similar effects on "national" game telecasts.

Summary of the Argument

The NFL's objective in distributing its entertainment product is to ensure that as many fans (and potential fans) as possible have the opportunity to see NFL games, on television or in person. As a result, all regular season and post-season NFL games are televised by national broadcast networks or via ESPN or TNT. However, not all fans receive the same NFL games. For business reasons described below, the League has opted to regionalize television distribution of its Sunday afternoon games and to "black out" telecasts of any games that are not sold out 72 hours in advance in the area immediately surrounding the game site. The "blackout rule" and other components of the League's television plan have been considered -- and endorsed -- on numerous occasions over the past 45 years by Congress, the FCC, and the federal courts.^{3/}

The statutory restrictions embodied in the current Section 119 license are fully consistent with the League's television distribution plan. Satellite program packagers are given a limited right to distribute network signals to "white area" homes that cannot receive network signals over-the-air and do not subscribe to cable. Distribution of network signals via satellite to this limited class of homes is a useful supplement to over-the-air television distribution and makes NFL football available to viewers who could not otherwise receive it.

As the Notice stated, however, "problems . . . have arisen in the operation of the satellite carrier compulsory license."^{4/} Satellite carriers have expanded their sales efforts

^{3/} For example, the blackout rule has been repeatedly upheld by the courts and has twice received congressional approval. See, e.g., United States v. National Football League, 116 F. Supp. 319, 325 (E.D. Pa. 1953); WTWV, Inc. v. National Football League, 678 F.2d 142 (11th Cir. 1982). See also 15 U.S.C. § 1292 and Pub. L. No. 93-107, 87 Stat. 350 (1973).

^{4/} Notice at 13399.

far beyond the narrow limits that Section 119 places on their distribution of network signals. Based on its investigation of unlawful interception of NFL telecasts by commercial establishments over the past several years, the League believes that certain satellite carriers, such as PrimeTime 24, have routinely sold network signals to commercial establishments and to persons who already receive network signals, in each case in violation of the law. By doing so, the satellite carriers have illegally undermined the integrity of the League's television distribution plan.^{5/}

The League's perspective on these "compliance problems" differs from that of other program providers because the League has unique interests that cannot be satisfied by satellite carrier payment of royalties. To address its concerns, the League suggests that (1) stricter sanctions be imposed when satellite carriers violate the terms of the Section 119 compulsory license, and (2) a new statutory provision be adopted to limit the network sports programming that satellite carriers can deliver pursuant to the Section 119 compulsory license to the network sports programming that is available via the local broadcast affiliates in the viewer's home region.

Argument

1. The League's Television Plan and Its Benefits.

In devising its Sunday afternoon television plan, the League has sought to balance television and in-stadium exposure to maximize both its national television audience and the local attendance of each member club. League economics, and the need to present the NFL's product in the most exciting way possible, require that this balance be carefully struck.

^{5/} See Memorandum of the National Football League in Support of Plaintiffs' Motion for a Preliminary Injunction, filed in CBS Inc., et al. v. PrimeTime 24 Joint Venture, Case No. 96-3650-Civ-Nesbitt (S.D. Fla.) (Attachment A hereto).

The NFL generates most of its revenues from gate receipts and national television contracts. These two sources are both shared among League members, but not at the same rate. Gate receipts are split between the home and visiting clubs, with the home club receiving approximately 60 percent; revenues from the national television contracts are divided equally among the League's member clubs. The League has entered into these revenue sharing arrangements to ensure that member clubs in smaller markets, such as Green Bay, may continue to compete on a "level playing field" with their rivals in larger markets, such as Chicago. If either of these two principal sources of NFL club revenue were threatened, the viability of small market teams would be imperiled.

To enhance the ability of teams to draw at the gate, the League has adopted the "blackout rule". Under this rule, if a home game of a member club is not sold out 72 hours in advance, the game is not televised in that team's home territory. The rule is primarily designed to promote home game attendance and enhance the quality of the stadium experience.[§] It also enhances quality of the League's telecast product, as a stadium filled with enthusiastic fans adds to the excitement and entertainment value of televised games.

The NFL's television plan also promotes team stability and fan loyalty. Two or three live Sunday afternoon games are shown on over-the-air broadcast television stations each week, in each television market in the country. Fans in Washington see a set of games chosen for the local market, which differs from the regionalized games offered to

[§] Local attendance is important economically to each club. Some of the money spent by fans at NFL games -- for concessions, parking, novelties, and the like, as well as for tickets -- goes to the home club. This money helps the home club pay rent for its stadium, and pay coaches, players, and others whose efforts go into putting a competitive, appealing product on the field.

fans in Boston or in San Francisco.²⁷ These regionalized sets of games include the games of clubs based in the local area and those of such clubs' key rivals. The regionalization of telecasts thus directly enhances fans' loyalties to their area teams and further protects the home gate.

The League's regionalized television policy represents a careful balance of competing interests that provides a solid foundation for League operations. If this balance is disrupted so fan attendance at games is decreased, the economic effects on the League and its clubs, and related effects on the quality of the League's televised and in-stadium product, are potentially far-reaching. The end result of such a change would likely be a fundamental decrease in the quality of the League's entertainment product.

2. Satellite Carriers' Practices Have Undermined the League's Regionalized Television Plan.

During its investigations of blackout violations by commercial establishments over the past three NFL seasons, the NFL has learned that satellite carriers have sold network programming to commercial establishments located in the heart of major cities, including the NFL communities of Buffalo and Detroit. By doing so, the satellite carriers have violated two explicit proscriptions in the Satellite Home Viewer Act -- one against selling network programming outside of "white areas" and the other against selling such programming at all to commercial establishments.

Unfortunately, these situations are not isolated ones where commercial establishments have slipped through the cracks of the satellite carriers' otherwise tight Section 119 compliance program. As advertisements by satellite carriers operating

²⁷ The same is true, to a more limited extent, of network telecasts of National Basketball Association, National Hockey League, Major League Baseball, and college football and basketball games.

exclusively under the Section 119 compulsory license show,^{8/} NFL football is a prime selling point for the carriers' services -- with multiple games being offered in each market in addition to the regionalized telecasts available over the air on Fox and NBC. And since Section 119 requires satellite carriers to transmit the entire signal of the stations they carry, the advertisements do not mention blackouts, and the carriers may not enforce them under the current law.^{9/}

If satellite carriers were adhering to the "white area" restrictions and simply bringing NFL football telecasts to unserved areas, the NFL would have no objection to the carriers' activity. In such circumstances, the satellite carriers would provide additional exposure to supplement the League's regionalized television plan. But rampant sales by satellite carriers in already-served areas -- bringing blacked-out games into markets where they should not be received -- have undermined the plan's integrity. This is particularly galling when the satellite packagers' services are being sold in violation of law to commercial establishments, who are also seeking to profit from this unlawful activity.

As noted above, the League's blackout rule is designed to protect home attendance.^{10/} Both Buffalo and Detroit had home attendance problems in the years in which the blackout violations were discovered, even though both clubs made the playoffs in those years. The Bills and Lions both believe that bars violating the blackouts

^{8/} Examples of such advertisements are included herewith as Attachment B.

^{9/} In contrast, the NFL strictly observes blackouts in its satellite-delivered package of out-of-market games, NFL Sunday Ticket(TM), and prosecutes subscribers who intentionally seek to circumvent the blackout rule. See, e.g., National Football League v. Play-By-Play S.B., 1995 WL 753840 (S.D. Tex. 1995).

^{10/} In the first case to uphold the League's blackout policy, the record demonstrated that when no such policy existed and non-sold-out home games were telecast in a club's home market, home attendance went down dramatically. See United States v. National Football League, 116 F.Supp. at 325.

contributed substantially to those problems. If (as one would expect) attendance were to worsen in years when the clubs were less successful, the clubs' economic viability would be threatened -- in no small part because of satellite carriers' violations of Section 119.

The satellite packagers' conduct also injures loyal NFL fans who, for whatever reason, cannot attend their home club's games. When the illegal interception of NFL games depresses home attendance, it guarantees that blackouts will not be lifted and that local fans who would have been able to see a sold-out game on free television will now be forced to pay to see the game at a bar, to violate the law themselves to get the game at home via satellite packagers' pay services, or to forgo watching the game on television. None of these choices is fair or in the long-term interest of the League, its clubs, or its fans.

3. **Sports Leagues' Ability to Regionalize Their Telecasts Must Be Protected if the Section 119 Compulsory License Is Modified.**

The NFL strongly believes that, as is the case with the cable compulsory license, the satellite compulsory license must contain restrictions to protect regionalized sports television plans.^{11/} The current "white area" provisions of Section 119, which balance the interests of satellite carriers, network affiliates, and copyright owners, would suffice if they were strictly enforced. Accordingly, the NFL supports retaining the current Section 119 restrictions, but adding stiffer penalties for satellite carrier violations of the rules and simplifying the process for ensuring carrier compliance with the law.

The League recognizes that satellite carriers will advance a different view. They

^{11/} Section 76.67 of the FCC's Rules contains such a restriction with respect to cable television systems. By virtue of Cable television's inherently local nature and because of the blackout protection afforded by Section 76.67, cable carriage of network stations does not have the same potential to undercut sports leagues' regionalized television plans as satellite television.

will urge that the "white area" rules be eased and attempt to justify easing the rules as a competitive necessity. In evaluating any such proposals, however, Congress and the Copyright Office must recognize that the "white area" restrictions are an elegant solution to a complex problem. They both allow network stations "to preserve the exclusivity of their programming in their market"^{12/} and protect the interests of entities that sell programming to national networks or local stations for regionalized distribution. Syndicated programming makes up the bulk of this programming at the local level, while sports represents the biggest share of regionalized network programming.

If restrictions on satellite distribution of network signals were eased, the royalty payments to network affiliates that are proposed by the Copyright Office would not satisfy all parties' interests. Such payments would not necessarily be passed through to the holders of copyrights in network programs (such as the League), or to syndicators whose revenues would be impaired if they could no longer deliver in-market exclusivity in selling programming to network affiliates. And even if a royalty pass-through provision were included in the law, such payments would not compensate sports leagues for disruption of their regionalized network television plans -- especially if the disruption led to non-competitive teams on the field or undermined team stability. As a result, any major modification of Section 119 would have to include a number of specific provisions to protect all involved parties' interests.

In such circumstances, the interests of sports leagues with regionalized network television packages could be fully satisfied only by a new statutory provision limiting the network sports programming that could be delivered by satellite carriers without sports league consent. Satellite carriers would be allowed to deliver only the network sports

^{12/} Notice at 13399.

programming that would be available to a viewer via his home-market over-the-air affiliate.^{13/} This "no additional sports" restriction reflects the same balancing of interests as the "white area" restrictions embodied in current law^{14/} and has a number of other virtues: it is simple and easy to understand; it can be implemented using existing technology;^{15/} and it eliminates any need to incorporate the varying television policies of different sports leagues into law, or to modify the law if those policies change. Moreover, by its very nature, the proposed restriction preserves the integrity of the League's regionalized television plan, which has been repeatedly approved by Congress and the federal courts.^{16/}

Conclusion

The importance of sports programming to viewers and to the broadcast industry justifies statutory protections for leagues' regionalized network television distribution plans. No other type of programming poses the same set of issues as sports, and the unintended consequences that could flow from a failure to provide adequate protection for

^{13/} As is currently the case under Section 119, satellite carriers' delivery of network sports programming to "white area" viewers would not need to be restricted, because such delivery would not interfere with leagues' regionalized network television plans.

^{14/} The NFL suggests that such a provision be adopted even if no other changes are made to Section 119, to address the situations of the few viewers located in major television markets who cannot receive network signals due to terrain shielding, electronic interference, or the like.

^{15/} Satellite carriers have the ability to determine what programming viewers are able to receive via Zip Codes. The NFL currently uses this Zip Code information to implement its blackouts on NFL Sunday Ticket, and other satellite carriers could easily use it to implement a "no additional sports" rule at low cost to the carriers. However, the carriers would also have to be required to do appropriate data checks to protect against subscriber cheating.

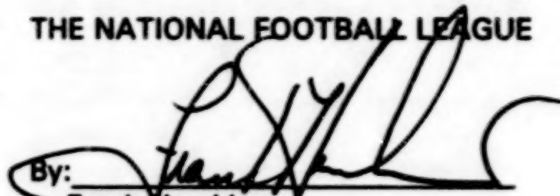
^{16/} The NFL recognizes that other sports leagues are also concerned with superstation delivery of their league programming. As all regular- and post-season NFL games are shown on network television, the NFL does not face such issues and accordingly does not comment on such matters.

sports' interests would be directly contrary to both settled law and the public interest.

For these reasons, the NFL respectfully urges that the Copyright Office report recommend that Congress incorporate a "no additional sports" provision into the network compulsory license provisions of the Satellite Home Viewer Act, regardless of any other changes to the law that may be made.

Respectfully submitted,

THE NATIONAL FOOTBALL LEAGUE

By: 

Frank Hawkins
Vice President-Law/
Enterprises, Broadcast & Finance

April 28, 1997

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

CBS INC., et al.,

Plaintiffs,

v.

Case No. 96-3650-Civ-Nesbitt
Magistrate Judge Johnson

PRIMETIME 24 JOINT VENTURE,

Defendant.

**MEMORANDUM OF THE NATIONAL FOOTBALL LEAGUE IN
SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

The National Football League ("NFL" or "League") submits this memorandum in support of plaintiffs' motion for a preliminary injunction. As discussed below, the League is a program supplier to the major television networks and is the owner of copyright in all telecasts of Sunday afternoon NFL games during the regular season. Because the League's agreements with the networks require that different games be shown in different regions of the country, the importation of distant signals poses a significant threat to the NFL's television plan. Specifically, this practice poses a substantial threat to the integrity of the League's local blackout of home games that are not sold out. It also undermines the League's sales of a supplementary, satellite-delivered package of game telecasts that includes games not broadcast locally, other than those subject to the local blackout.

The NFL's Television Plan

The NFL is an unincorporated nonprofit association comprised of 30 member clubs that own and operate professional football teams. Declaration of NFL Vice President-Law Enterprises, Broadcast & Finance Frank Hawkins ("Hawkins Decl.") ¶ 2. The primary business of the League and the member clubs is the presentation of an entertainment product -- NFL championship professional football. Id. The NFL is divided into two conferences, the American and the National, with fifteen (15) member clubs belonging to each. Id.

All regular season and post-season games played by NFL clubs are televised either by NBC, fox, ABC, ESPN, or TNT. Hawkins Decl. ¶ 3. On Sunday afternoons during the regular season, games in which the visiting team is a member of the National Conference are televised by Fox and games in which the visiting team is a member of the American Conference are televised by NBC (ABC, ESPN, and TNT televise evening prime-time national specials). Id. The NFL is the owner of copyright in all regular season Sunday afternoon games telecast by Fox and NBC. Id.¹

The NFL has traditionally made all of its regular and post-season games available on free broadcast television -- and a greater percentage of its total games than any other major professional sports league. Hawkins Decl. ¶ 4. For decades every regular season NFL game has been broadcast on at least a regional

¹ As the copyright owner, the NFL has the exclusive right "to perform the copyrighted work publicly." 17 U.S.C. § 106(4). This right also encompasses the ability to limit distribution of its works -- e.g., geographically. See, e.g., Steward v. Abend, 495 U.S. 207, 228-29 (1990) ("nothing in the copyright statutes would prevent an author from hoarding all of his words during the term of the copyright"); Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) ("The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property.").

basis, and fans in each market have had available to them at least three and sometimes as many as six games (of a maximum 15 games played) each week. Id.

During the 1996 regular season, each Sunday afternoon two or three NFL games were broadcast live by Fox and NBC in each television market in the country. Hawkins Decl. ¶ 5. For example, in Miami, on Sunday afternoons when the Miami Dolphins played an away game, three games -- including the Dolphins game -- were broadcast in the Miami market. Id. When the Dolphins played at home, two games were broadcast -- including the Dolphins game if it was sold out and therefore not "blackout" pursuant to longstanding rules, repeatedly upheld by judicial decisions, see pp. 4-5, below, that are intended to promote live attendance at NFL games. Id.

The Blackout Rule

The League's blackout rule provides that home games of NFL member clubs that are not sold out 72 hours in advance generally are not to be televised in that club's home territory. Hawkins Decl. ¶ 6. The rule promotes home game attendance and enhances the quality of both the stadium experience and the television programming, as arenas packed with lively fans add to the entertainment value of the event. Id.

The blackout rule is an integral part of the League's revenue sharing arrangements. Hawkins Decl. ¶ 7. The NFL generates most of its revenues from two sources -- gate receipts and national television contracts. Id. Gate receipts are split between the home and visiting clubs, with the home club receiving approximately 60 percent; revenues from the national television contracts are divided equally among the 30 member clubs. Id. The League has entered into these revenue sharing arrangements to ensure that member clubs in smaller markets.

such as Green Bay, may continue to compete on a level playing field with their rivals in larger markets, such as Chicago. *Id.* If either of these two principal sources of revenue were threatened, the League's ability to ensure the viability of small market teams would be imperiled. *Id.*

Experience has shown that, without the blackout rule, home attendance would decline and, with it, so would shared gate receipts. *Id.* The League also has reason to be concerned that games played before small crowds would have less entertainment value, which in turn would cause nationwide television audiences to decline. *Id.*

The blackout rule has been repeatedly upheld by the courts and has twice received congressional approval. *See, e.g., United States v. National Football League*, 116 F. Supp. 319, 325 (E.D. Pa. 1953) ("reasonable protection of home game attendance is essential to the very existence of the individual clubs, without which there can be no League and no professional football as we know it today"); *Blaich v. National Football League*, 212 F. Supp. 319 (S.D.N.Y. 1962) (denying motion for preliminary injunction against local blackout); 15 U.S.C. § 1292 (declaring that pooled television rights agreements may not contain any territorial restrictions "except within the home territory of a member club of the league on a day when such a club is playing a game at home"); Pub. L. No. 93-107, 87 Stat. 350 (1973) (prohibiting blackouts of home games sold out 72 hours in advance).

More recently, the Eleventh Circuit has been among the courts to reject challenges to the blackout rule. *See, e.g., WTWV, Inc. v. National Football League*, 679 F.2d 142 (11th Cir. 1982) (upholding validity of blackout rule in rejecting challenge by television station located outside blackout area but whose signals penetrated area); *Stoutenborough v. National Football League*, 59 F.3d 580 (6th Cir.

1993) (affirming dismissal of challenge to blackout policy brought under Americans with Disabilities Act); Hertel v. City of Pontiac, 470 F. Supp. 603 (E.D. Mich. 1979) (rejecting Equal Protection challenge to blackout rule).

In addition, the federal courts have repeatedly enforced the blackout rule in copyright infringement actions brought by the League. In every instance, the courts have upheld the League's right to implement the blackout of a local game. See, e.g., National Football League v. McBee & Bruno's, Inc., 792 F.2d 726 (8th Cir. 1986); National Football League v. Rondor, Inc., 840 F. Supp. 1160 (N.D. Ohio 1993). In fact, no fewer than six different judges of this Court have permanently enjoined commercial establishments from showing blacked out home games of the Miami Dolphins.²

NFL Sunday Ticket™

In the most recent of these cases, the Court also enjoined establishments from showing other "out of market" games, i.e., games not locally broadcast involving teams other than the Dolphins. These games are legally available only to subscribers of a satellite television package of NFL games known as "NFL Sunday Ticket™." Hawkins Decl. ¶ 10. The package includes all regular season Sunday afternoon games except those not shown in a local area pursuant to the blackout rule. Id. NFL Sunday Ticket™ was first made available to residential and commercial satellite dish antenna owners in 1994. Id.

By purchasing NFL Sunday Ticket™, subscribers gain access to NFL games that otherwise are unavailable to them because they are broadcast only in other television markets. Hawkins Decl. ¶ 11. For the 1996 season, the subscription rate for residential use was \$159; the rate for most commercial establishments

² True and correct copies of final judgments in those lawsuits are attached as Exhibits A-F of the Hawkins Declaration.

ranged from \$449 to \$1,999, depending on fire occupancy code. *Id.* Revenues from sales of NFL Sunday Ticket™ subscriptions are divided equally among the NFL clubs. *Id.*

To protect the value of its investment and the investment made by legitimate NFL Sunday Ticket™ subscribers (as well as to ensure control over the public distribution and performance of its copyrighted works), the NFL has stepped up an already active copyright enforcement program. Hawkins Decl. ¶ 12. In the last three years alone, the League has brought approximately 30 lawsuits against more than 200 commercial establishments in federal courts across the country (including this Court). *Id.*

PrimeTime 24

Through its enforcement program, the NFL has found that a number of commercial establishments have used illegal subscriptions purchased from PrimeTime 24 and other satellite carriers to show NFL games that were not broadcast locally, including blacked-out Dolphins home games. Hawkins Decl. ¶ 13. Based upon its experience in its enforcement program, the NFL believes that buying subscriptions to network programming provided by PrimeTime 24 and other satellite services is one of the principal means bars and other commercial establishments use to circumvent the League's blackout rule. *Id.*

By subscribing to one or more of the network affiliate packages offered by PrimeTime 24, satellite dish owners can receive many games in addition to those that they can receive with an off-air receiving antenna or through their cable subscription. Hawkins Decl. ¶ 14. For example, a satellite dish owner in Miami may receive -- in addition to the NFL games shown by the Fox and NBC affiliates in Miami -- games shown by the Fox and NBC affiliates in New York, Los Angeles, and

other markets. Id. Although there may be some overlap between the games being shown in Miami and those being shown in these other markets, we estimate that illegal subscribers to just one PrimeTime 24 network affiliate package are able to receive approximately half of all NFL Sunday afternoon games (and all or nearly all those most in demand). Id.

Access to increased NFL football has been prominently featured by PrimeTime 24 in its marketing and advertising materials. Hawkins Decl. ¶ 15. Indeed, one magazine advertisement boldly proclaims that: "ALL THE FOOTBALL YOU NEED IS ON PRIMETIME 24." Hawkins Decl., Exh. G. The advertisement explains that "over 100 games [are available] on PT East, PT West, and FOXNET." Id. Another advertisement boasts that "with PT West and PT East" subscribers receive "more NFL games." Hawkins Decl., Exh. H.

Were PrimeTime 24 selling only to "unserved households," subscribers of one of their network packages would be receiving the same amount of NFL football as anyone else -- they simply would be receiving it from different affiliates. That PrimeTime 24 markets expanded access to NFL football and other programming is further evidence that it has strayed far from its statutory charter.

CONCLUSION

The sale by PrimeTime 24 of illegal subscriptions of its network affiliate packages to commercial establishments and to "served" households harms the NFL in a number of ways -- most notably, by providing a means to circumvent local blackouts and by reducing demand for NFL Sunday Ticket™. Hawkins Decl. ¶ 15. If PrimeTime 24 is not enjoined, the problem will grow as word spreads among satellite dish owners. Id.

For the foregoing reasons, plaintiffs motion for a preliminary injunction should be granted.

Date: March 18, 1997

Respectfully submitted,

LOTT & FRIEDLAND, P.A.



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Counsel for the National Football League

CBS INC., et al.,
Plaintiffs,
v.
PRIMETIME 24 JOINT VENTURE,
Defendant.

1. I am Vice President-Law/Enterprises, Broadcast & Finance for the National Football League (the "NFL" or "League"). Since I started with the League in 1993, I have been actively involved in television matters.

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The NFL's Television Plan

3. All regular season and post-season games played by NFL clubs are televised either by NBC, Fox, ABC, ESPN, or TNT. Games televised on either ESPN or TNT also are available simultaneously via over-the-air broadcast television in the markets of the two participating teams, subject to the home area blackout discussed below (see ¶¶ 6-8). On Sunday afternoons during the regular season, games in which the visiting team is a member of the National Conference are televised by Fox and games in which the visiting team is a member of the American Conference are televised by NBC (ABC, ESPN, and TNT televise evening prime-time national games). The NFL is the owner of the copyright in all regular season Sunday afternoon games telecast by Fox and NBC.

4. The NFL has traditionally made available on free broadcast television all of its regular season and post-season games and far more of its total games than any other major professional sports league. For decades every regular season NFL game has been broadcast on at least a regional basis, and fans in each market have had available to them at least three and sometimes as many as six games (of a maximum 15 games played) each week.

5. During the 1996 regular season, two or three NFL games were broadcast live by Fox and NBC each Sunday afternoon in each television market in the country. For example, in Miami, on Sunday afternoons when the Miami Dolphins played an away game, three games -- including the Dolphins game -- were broadcast in the Miami market. When the Dolphins played at home, two games were broadcast --

including the Dolphins game if it was not "blackout" pursuant to the League's blackout rule.

The Blackout Rule

6. The League's blackout rule provides that home games of NFL member clubs that are not sold out 72 hours in advance generally are not to be televised in that club's home territory. The rule promotes home game attendance and enhances the quality of both the stadium experience and the television programming, as arenas packed with lively fans add to the entertainment value of the event.

7. The blackout rule is an integral part of the League's revenue sharing arrangements. The NFL generates most of its revenues from two sources -- gate receipts and national television contracts. Gate receipts are split between the home and visiting clubs, with the home club receiving approximately 60 percent; revenues from the national television contracts are divided equally among the 30 member clubs. The League has entered into these revenue sharing arrangements to ensure that member clubs in smaller markets, such as Green Bay, may continue to compete on a level playing field with their rivals in larger markets, such as Chicago. If these two principal sources of revenue were threatened, the League's ability to ensure the viability of small market teams would be imperiled.

8. Experience has shown that, without the blackout rule, home attendance would decline and, with it, so would shared gate receipts. The NFL also is concerned that the entertainment value of the League's television programming could be

impaired if games were no longer routinely played in front of enthusiastic sold-out crowds.

9. For nearly two decades the League has brought infringement actions and taken other steps to enforce compliance with the blackout rule, and the federal courts in every instance have upheld the League's right to implement the blackout of a local game. In fact, no fewer than six different judges of this Court have permanently enjoined commercial establishments from showing blacked out home games of the Miami Dolphins and other games not locally broadcast without proper authorization (attached as Exhibits A-F are true and correct copies of final judgments in those lawsuits).

NFL Sunday Ticket™

10. In an effort to increase consumer choice while still protecting League revenue-sharing arrangements, the League now makes available those games not locally broadcast to subscribers of a satellite television package of NFL games known as "NFL Sunday Ticket™." The package includes all regular season Sunday afternoon games except those not shown in a local area pursuant to the blackout rule. NFL Sunday Ticket™ was first made available to residential and commercial satellite dish antenna owners in 1994.

11. By purchasing NFL Sunday Ticket™, subscribers gain access to NFL games that otherwise are unavailable to them because they are broadcast only in other television markets. For the 1996 season, the subscription rate for residential use was \$159; the rate for most commercial establishments ranged from \$449 to \$1,999,

depending on fire occupancy code. Revenues from sales of NFL Sunday Ticket™ subscriptions are divided equally among the NFL clubs.

12. To protect the value of its investment and the investment made by legitimate NFL Sunday Ticket™ subscribers (as well as to ensure control over the public distribution and performance of its copyrighted works), the NFL has stepped up an already active copyright enforcement program. In the last three years alone, the League has brought approximately 30 lawsuits against more than 200 commercial establishments in federal courts across the country (including this Court). In every case that has been finally resolved, the League's claims against all defendants have been sustained.

PrimeTime 24

13. Through its enforcement program, the NFL has found that a number of commercial establishments have used illegal subscriptions purchased from PrimeTime 24 and other satellite carriers to show NFL games that were not broadcast locally, including blacked-out Dolphins home games. Based upon its experience in its enforcement program, the NFL believes that buying subscriptions to network programming provided by PrimeTime 24 and other satellite services is one of the principal means bars and other commercial establishments use to circumvent the League's blackout rule.

14. By subscribing to one or more of the network affiliate packages offered by PrimeTime 24, satellite dish owners can receive many games in addition to those that they can receive with an off-air receiving antenna or through their cable subscription. For example, a satellite dish owner in Miami may receive -- in addition to

the NFL games shown by the Fox and NBC affiliates in Miami -- games shown by the Fox and NBC affiliates in New York, Los Angeles, and other markets. Although there may be some overlap between the games being shown in Miami and those being shown in these other markets, we estimate that illegal subscribers to just one PrimeTime 24 network affiliate package are able to receive approximately half of all NFL Sunday afternoon games (and all or nearly all those most in demand).

15. Access to increased NFL football has been prominently featured by PrimeTime 24 in its marketing and advertising materials. True and correct copies of two such advertisements placed by PrimeTime 24 are attached as Exhibits G and H.

16. The sale by PrimeTime 24 of illegal subscriptions of its network affiliate packages to commercial establishments and to "served" households harms the NFL in a number of ways -- most notably, by providing a means to circumvent local blackouts (impairing attendance at NFL games) and by reducing demand for NFL Sunday Ticket™. If PrimeTime 24 is not enjoined, the problem will grow as word spreads among satellite dish owners.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 7, 1997, in Washington, D.C.


Frank Hawkins

How Can You Watch **ERISER**
and **Home Improvement**
in The Same Night?

HINT:
YOU DON'T NEED
2 TV SETS

**With PT West and PT East, watch
one show on Eastern/Central time
and the other on Pacific time!**

*If you qualify for PrimeTime 24 programming,
enjoy both feeds and get the extra convenience of time shifting.**

Two great shows on the same night, the same time. What do you do? When you have PT East and PT West, your time conflicts are over — your favorite shows are on twice a night, at two different times! With PT East or PT West, you'll get:

- **Great Cities** — New York, Los Angeles, San Francisco, Seattle and Raleigh.
- **More News** — the variety of local news and specials.
- **More Sports** — more teams, professional and college. More NFL games. More baseball, including the World Series. More NBA games. *Watch More NBA Basketball on KIRO and WNBC!*
- **More Syndicated Shows, Soaps and Talk Shows!**
- **24 Hours of Crystal Clear, Digital Stereo Programming**

Save 24%! Add PT West to PT East or PT East to PT West and

Call 1-800-883-PT2

Make sure you have both PT East and PT West in your package! Call us or one of the many distributors who carry PrimeTime 24 channels in their packages for other special prices!



KPIX
San Francisco



KABC
Los Angeles



KQED
San Francisco



WYAT
Raleigh



WNBC
New York



WABC
New York



America's Network Of
Coast to Coast

*PrimeTime 24's satellite network services are available in all areas where affiliated network signals are not clearly received.

Boxing

Professional

THURSDAY
 5:00p Boxing PPS P1, 18.
FRIDAY
 8:00p Boxing CHAM A1, 18.
 9:30p Frank Bruno vs. Oliver McCall SHO-F P1, 18.
 11:00p Fight Night at the Great Western Forum PSW P1, 22.
 12:00a Frank Bruno vs. Oliver McCall SHO-W F4, 26.
SATURDAY
 10:00p Roy Jones Jr. vs. Vinny Pazienza PRIME P1, 11. SCHE S2, 21.
SUNDAY
 9:00p Roy Jones Jr. vs. Vinny Pazienza SCCH P1, 13.
 1:30p Roy Jones Jr. vs. Vinny Pazienza PSW P1, 7.
MONDAY
 11:30p Fight Night at the Great Western Forum SCCH P1, 13.
TUESDAY
 8:30p Roy Jones Jr. vs. Vinny Pazienza ASOW F4, 8.
 9:00p Boxing PSW S2, 8 LAR
 11:00p Roy Jones Jr. vs. Vinny Pazienza PSW P1, 22. SCHE P1, 4.
 4:00p Roy Jones Jr. vs. Vinny Pazienza PSW P1, 18.
WEDNESDAY
 8:00p Boxing CHAM A1, 18. SHP A1, 9 LAR PSW P1, 18 LAR ATZ S2, 23 LAR ASOW F4, 8 LAR PRIME P1, 11 LAR PSW P1, 22 LAR SCCH P1, 15 LAR SCHE S2, 21 LAR SCHE P1, 4 LAR SCHE S2, 21 LAR SUN P1, 24 LAR
 9:00p Oscar De La Hoya vs. Genaro Hernandez SCCH P1, 3 LAR
THURSDAY
 8:00p Roy Jones Jr. vs. Vinny Pazienza PPS S2, 21.
 11:00p Fight Night at the Great Western Forum SHP A1, 9 LAR PSW P1, 18 LAR PRIME P1, 11 LAR PSW P1, 7 LAR SCCH P1, 15 LAR SCHE P1, 4 LAR SCHE S2, 21 LAR SPTS S2, 19 LAR SUN P1, 24 LAR
 12:00a Fight Night at the Great Western Forum ASOW F4, 8.
 2:00a Boxing PSZ P1, 18.
 12:00p Fight Night at the Great Western Forum ATZ S2, 23.
 9:00p Boxing USA-F S2, 18 LAR
 12:00a Boxing USA-W S1, 21.
FRIDAY
 8:00p Fight Night at the Great Western Forum PPS S2, 21. SCCH P1, 13.
SATURDAY
 8:30p Boxing PSW S2, 8 LAR
SUNDAY
 4:50p Fight Night at the Great Western Forum ATZ S2, 23.
 8:00p Boxing CHAM A1, 18.
 9:00p Julio Cesar Chavez vs. David Kamau SCCH P1, 3 LAR
MONDAY
 11:00p Prime Champ. Series SHP A1, 9 LAR PRIME P1, 11 LAR PSW P1, 7 LAR SCCH P1, 15 LAR SCHE S2, 21 LAR SPTS S2, 19 LAR
 11:30p Prime Champ. Series SUN P1, 24 LAR
TUESDAY
 9:00p Boxing USA-F S2, 18 LAR
 12:00a Boxing USA-W S1, 21.
 12:30a Prime Champ. Series PSW P1, 18.
WEDNESDAY
 11:30p Prime Champ. Series SCCH P1, 13.

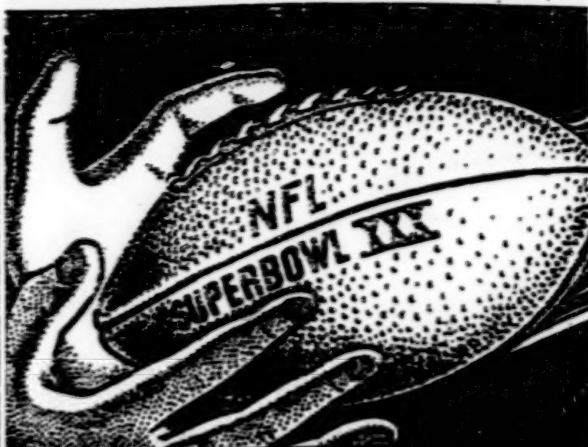
THURSDAY
 7:30p Prime Champ. Series HTZ S2, 23.
 8:00p Prime Champ. Series JSSW F4, 8. PPS S2, 21.
 9:00p Boxing SHP S2, 8 LAR
FRIDAY
 7:00p Prime Champ. Series SCCH P1, 4.
 Roy Jones Jr. vs. Vinny Pazienza SHP A1, 8.
 8:00p Boxing CHAM A1, 18.
SATURDAY
 11:00p Fight Night at the Great Western Forum SHP A1, 9 LAR JSSW F4, 8 LAR PRIME P1, 11 LAR PSW P1, 7 LAR SCCH P1, 15 LAR SCHE S2, 21 LAR SPTS S2, 19 LAR SUN P1, 24 LAR
 11:30p Fight Night at the Great Western Forum SCCH P1, 13 LAR-JIP
 12:00a Fight Night at the Great Western Forum ATZ S2, 23 LAR-JIP
 3:00a Fight Night at the Great Western Forum PSW P1, 18.
SUNDAY
 9:00p Boxing USA-F S2, 18 LAR
 12:00a Boxing USA-W S1, 21.
 4:00a Prime Champ. Series PSZ P1, 18.
MONDAY
 7:00p Fight Night at the Great Western Forum PSW P1, 22.
 11:30p Fight Night at the Great Western Forum SCCH P1, 13.
TUESDAY
 9:00p Boxing SHP S2, 8 LAR
WEDNESDAY
 8:00p Boxing CHAM A1, 18.
 10:00p Roy Jones Jr. vs. Tony Thornton ASO-F S2, 18 LAR ASO-W S2, 8 LAR

Amateur

THURSDAY
 4:00a Champ. PSZ P1, 18.
FRIDAY
 3:00a Champ. PSZ P1, 18.
SATURDAY
 4:00a Champ. PSZ P1, 18.
SUNDAY
 3:00a Champ. PSZ P1, 18.
MONDAY
 2:00a Champ. PSZ P1, 18.
TUESDAY
 4:00a Champ. PSZ P1, 18.
WEDNESDAY
 3:00a Champ. PSZ P1, 18.
THURSDAY
 2:00a Champ. PSZ P1, 18.
FRIDAY
 3:00a Champ. PSZ P1, 18.

Boxing Misc.

THURSDAY
 3:30p Main Event PSZ P1, 18.
 12:30a World Toughman Competition - Midwest Regional PSW P1, 18.
FRIDAY
 3:30p Main Event PSZ P1, 18.
SATURDAY
 3:30p Main Event PSZ P1, 18.
SUNDAY
 3:30p Main Event PSZ P1, 18.
MONDAY
 11:30p Main Event PSZ P1, 18.
TUESDAY
 3:30p Main Event PSZ P1, 18.
WEDNESDAY
 3:30p Main Event PSZ P1, 18.
THURSDAY
 3:30p Main Event PSZ P1, 18.



ALL THE FOOTBALL YOU NEED IS ON PRIMETIME 24.

If you love football, you'll get a big kick out of PrimeTime 24 fall schedule. We have enough games and excitement satisfy even the die-hard fan. Including:

- Over 100 games on PT East, PT West and FOX
- The only place you can get all 10 playoff games
- The only place you get SuperBowl XXXI
- Monday night football
- Thanksgiving Day Games.
- Late-Season Saturday double headers.

Plus your favorite network programming from 7 major cities: movies, drama, comedy and news...with a choice of Eastern and Pacific viewing times so you never miss a show. All in a single, complete network package.

PrimeTime 24-Your network and football connection. Call one of our packagers or order directly from us:

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See all the action on 54, G4.



America's Network Connection Coast to Coast.

ABC, CBS, NBC, and FOX Channels are available only for homes (1) which cannot receive an adequate picture from local ABC, CBS, NBC, and FOX stations for a commercial reason; and (2) which have not subscribed to cable television within the last 90 days.

APR 28 1997

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In the Matter of

Revision of the Cable and
Satellite Carrier
Compulsory License

Docket No. 97-1

17

COMMENTS OF THE OFFICE OF
THE COMMISSIONER OF BASEBALL

Robert Alan Garrett
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April 28, 1997

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Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of)

Revision of the Cable and)
Satellite Carrier)
Compulsory License)
_____))

Docket No. 97-1

COMMENTS OF THE OFFICE OF
THE COMMISSIONER OF BASEBALL

The Office of the Commissioner of Baseball, on behalf of the thirty clubs engaged in the sport of Major League Baseball ("Baseball"), submits the following comments in response to the Copyright Office's "Notice of Public Meetings and Request for Comments" published at 62 Fed. Reg. 13396 (Mar. 20, 1997) ("Notice"). The Notice seeks comments on several issues related to the cable and satellite compulsory licenses in Sections 111 and 119 of the Copyright Act. 17 U.S.C. §§ 111 & 119. The Copyright Office has sought comments to assist in the preparation of a report that Congress has requested in connection with the possible legislative reexamination of Sections 111 and 119.

INTRODUCTION AND SUMMARY

A fundamental principle of copyright is that commercial enterprises should not exploit copyrighted works without the consent of the copyright owners. Sections 111 and 119 represent exceptions to this principle. They permit "cable systems" (Section 111) and "satellite carriers" (Section 119) to retransmit, to their paying subscribers, the copyrighted programming on broadcast stations -- without obtaining the consent, indeed over the objection, of the affected copyright owners.

There is no justification for continuing to exempt the cable and satellite carrier industries from normal marketplace negotiations. Cable operators and satellite carriers should be required to bargain in the marketplace for the copyrighted programming on broadcast signals, just as they now bargain for the copyrighted programming on non-broadcast signals. The Section 111 and 119 compulsory licenses should be repealed.

If, however, the Section 111 and 119 compulsory licenses are retained, their scope should not be broadened to encompass new retransmission technologies. In particular, Congress should not extend Sections 111 and 119 to retransmissions made (1) via the Internet or (2) by telephone companies over open video systems or other new technology. Copyright owners should be

afforded the opportunity to develop these markets without government interference.

Furthermore, if Sections 111 and 119 are retained, Congress should significantly revise those provisions to achieve the following objectives:

-- Fair Market Value. Copyright owners should receive compensation that reflects the fair market value of the works subject to compulsory licensing. Copyright owners should not be required to subsidize the corporate giants that now dominate the cable and satellite carrier industries.

-- Compensable Programming. Cable systems and satellite carriers should pay fair market value compensation for all of the programming that they exploit pursuant to Sections 111 and 119. This includes programming distributed by the national broadcast networks and programming retransmitted on a local (as well as distant) basis.

-- "Passive" Carriers. The passive carrier exemption (17 U.S.C. § 111(a)(3)) should be modified insofar as it permits carriers to retransmit broadcast signals via satellite without paying any compensation to copyright owners. These carriers make a separate public

performance of the copyrighted programming on superstations and other broadcast stations. They profit from exploiting that programming and should be required to share those profits with the affected copyright owners.

-- Royalty Calculation. The current method of calculating cable royalties is needlessly complex, subject to abuse by questionable accounting methods, varies widely from cable operator to cable operator and fails to provide fair market value compensation. A per subscriber/per signal method similar to that found in Section 119 should be adopted.

-- Terms and Conditions. Cable operators and satellite carriers should be required not only to pay a compulsory licensing fee; they also should be required to comply with terms and conditions that are typically negotiated in marketplace transactions, such as protecting exclusive rights granted other parties.

-- Transaction Costs. Congress justified compulsory licensing as a means of reducing transaction costs. While this objective may have been achieved for cable operators and satellite carriers, the current system subjects copyright owners to substantial and unnecessary

administrative costs. These costs should be reduced as much as possible and should be shared more equitably by those who take advantage of compulsory licensing.

Baseball believes that the above objectives can be achieved most efficiently through a system of "tariffing." Such a system would permit each of the existing groups of copyright owners -- subject to appropriate review -- to establish reasonable rates and other terms for the use of their works. Cable systems and satellite carriers would receive a compulsory license to retransmit broadcast programming as long as they complied with the approved tariffs.

DISCUSSION

The conditions that led to the adoption of compulsory licensing in the Copyright Act of 1976 no longer exist. The dramatic changes in the communications industry during the past twenty years make clear that compulsory licensing is a dinosaur that has outlived its usefulness. Sections 111 and 119 should, therefore, be eliminated. At the very least, these provisions should not be expanded to new retransmission technologies. They also should be significantly revised to produce marketplace results and

to reduce the substantial administrative costs that copyright owners must now bear.

I. If Sections 111 And 119 Are Retained, Their Present Scope Should Not Be Extended To Encompass Every New Retransmission Technology.

A. A Compulsory License Is A "Last Resort" That Should Be Used Only In Limited Circumstances.

The Copyright Act generally leaves the licensing of the copyright owner's rights to the marketplace because that approach most efficiently serves the dual purpose of copyright: to promote public access to works by providing incentives for the creation of those works. As the Copyright Office has correctly concluded, a compulsory license "represents a derogation from the basic copyright principles embodied in the Copyright Act that ensure to copyright owners the right to control the use of their creations" Cable Compulsory License: Definition of Cable Systems, 56 Fed. Reg.

31580, 31582 (1991) (describing Section 111); see Fame Publishing Co. v. Alabama Custom Tape, Inc., 507 F.2d 667, 670 (5th Cir.), cert. denied, 423 U.S. 841 (1975).

As the Copyright Office also has concluded, "In our free enterprise, marketplace system, a government mandated compulsory taking of property rights is a last resort." Register of Copyrights, Report on the Cable

and Satellite Carrier Compulsory Licenses: An Overview and Analysis 154 (Mar. 1992). Indeed, the United States consistently opposes the use of compulsory license systems by other countries in order to maintain copyright protection for U.S. works. See Digital Performance Right in Sound Recordings Act of 1995: Hearings on H.R. 1506 Before the Subcomm. on Courts and Intellectual Property of the House Committee on the Judiciary, 104th Cong., 1st Sess. 157 (statement of Bruce A. Lehman).

These principles require that the existing compulsory licenses should "not be given a wide scale interpretation which could, or will, encompass any and all new forms of retransmission technology." 56 Fed. Reg. 31580, 31590 (1991). Compulsory licenses should be granted only in limited circumstances, and only where an industry has demonstrated to Congress specifically that marketplace licensing mechanisms will not promote the purposes of the Copyright Act.

Moreover, each new retransmission technology raises a different set of concerns as to how it will affect the rights of copyright owners; rationales underlying a compulsory license for one retransmission technology do not necessarily extend to others. Consequently, a separate determination of whether a

compulsory license is necessary must be made for each retransmission service.

B. Retransmissions Of Broadcast Signals Via The Internet Should Not Be Subject To New Or Existing Compulsory Licenses.

The Copyright Office should make clear that retransmissions over the Internet do not qualify for the existing cable compulsory license in Section 111 or the satellite carrier license of Section 119. In addition, the ease with which works can be disseminated worldwide via the Internet requires that copyright owners retain exclusive rights to retransmissions over this new medium, and thus a new compulsory license is unwarranted and unnecessary.

Section 111 provides a compulsory license only for a "cable system", which is defined as "a facility located in any State . . . that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations" 17 U.S.C. § 111(f). This definition requires that only community-based cable systems that both receive and transmit signals within the same state are eligible for the Section 111 compulsory license. See 37 C.F.R. § 201.17(k); Satellite Broadcasting Networks v. Oman, 17 F.3d 344 (11th Cir.), cert. denied, 115 S. Ct. 88 (1994). As the Administration's Task Force on the

National Information Infrastructure concluded, a facility that makes Internet retransmissions necessarily sends and receives transmissions nationally (indeed, internationally) and thus would not qualify for the cable compulsory license. Information Infrastructure Task Force, The Report of the Working Group on Intellectual Property Rights 99 & n.309 (Sept. 1995) (hereinafter "NII White Paper").

Likewise, the Section 119 compulsory license does not apply to Internet retransmissions of broadcast signals. The NII White Paper concluded that Section 119 is inapplicable as long as the Internet retransmitter does not make use of a satellite. Id. at 99-100 n.310. The Copyright Office should clarify that Section 119 is never applicable to Internet retransmissions, regardless of whether satellite technology is involved. Obviously, when Congress granted Home Satellite Dish and Direct Broadcast Satellite operators a compulsory license, it did not intend to grant a compulsory license for Internet retransmissions simply because they involved some use of a satellite.

Internet retransmissions also should not be granted a new compulsory license. The Administration specifically opposed compulsory licensing for the transmission of works via the Internet: "The Working Group finds that, under current conditions, additional

compulsory licensing of intellectual property is neither necessary nor desirable." NII White Paper at 52. This position was based on the principle that:

Compulsory licensing disregards marketplace forces. Such licensing schemes treat all works alike, even though their value in a competitive marketplace would likely vary dramatically. It also treats all users alike. It alters the free market relationship between buyer and seller. Moreover, transaction costs -- and the attendant savings from compulsory licensing -- can be minimized in a digital environment.

Id.

The specific nature of the Internet makes compulsory licensing particularly inappropriate. Retransmissions via the Internet are quite different from retransmissions subject to existing compulsory licenses and implicate more than the copyright owner's right of public performance. Internet retransmissions can be easily stored, edited and retransmitted by a recipient to other Internet users virtually anywhere in the world, almost simultaneously with the original retransmission.

This real-time, global aspect of the Internet can be particularly harmful to time-sensitive programming such as sporting events. For example, a compulsory license for Internet retransmissions would ultimately permit real-time broadcasts of sporting events

throughout the world. This would significantly impact a growing source of revenue for U.S. sports leagues: the export of sports programming to foreign markets, which often broadcast games on a tape-delay basis and in condensed form due to time zone differences.

C. Retransmissions Of Broadcast Signals By Telephone Companies, Over Open Video Systems Or Other New Technology, Should Not Be Subject To New Or Existing Compulsory Licenses.

Baseball, as part of the Joint Sports Claimants, already has submitted comments to the Copyright Office on the issue of whether open video systems are entitled to the cable compulsory license. See Comments of Joint Sports Claimants in Copyright Office Docket No. 96-2 (filed July 3, 1996). As explained in those comments (which are incorporated by reference), Congress never intended to grant compulsory licensing to open video systems. Moreover, the original policies underlying the Section 111 and 119 compulsory license are inapplicable to any other new retransmission technology offered by telephone companies, which are fully capable of negotiating for program rights with copyright owners. Congress should afford the marketplace an opportunity to develop licensing mechanisms for open video systems, as well as any other new retransmission technology operated by telephone companies.

II. The Existing Compulsory Licenses Should Be Revised Significantly.

The Section 111 compulsory license was adopted more than twenty years ago and tailored to a then-embryonic cable industry comprised almost entirely of "mom-and-pop" businesses; it was, moreover, geared to a highly complex set of now-defunct FCC signal carriage rules. The Section 119 compulsory license was, in large measure, tied to Section 111 -- particularly in the amount of compensation that copyright owners receive and in the administrative mechanisms for collecting and distributing royalties. Both of these compulsory licenses require substantial revision to accommodate the dramatic changes that have occurred during the past twenty years.

A. Copyright Owners Should Receive Compensation That Reflects The Fair Market Value Of The Works Subject To Compulsory Licensing.

Cable operators currently pay, for most of the broadcast programming that they retransmit, the royalty rates adopted by Congress in the 1976 Act (as adjusted in 1981 only to account for factors related to inflation). As the Copyright Royalty Tribunal correctly concluded, the statutory royalty rates are not the rates that

would result from full marketplace conditions if the compulsory license did not exist. The rates were established as a legislative compromise, they are arbitrary and they were intended to require only a minimum payment on the part of cable operators.

Adjustment of the Royalty Rate for Cable Systems, 47

Fed. Reg. 52146, 52154 (Nov. 19, 1982) ("CRT Rate Adjustment Determination"), aff'd, National Cable Television Association v. Copyright Royalty Tribunal, 724 F.2d 176 (D.C. Cir. 1983) (NCTA v. CRT). In a free market, copyright owners would never "accept rates similar to those in the statute." 47 Fed. Reg. at 52154.

In its Rate Adjustment Determination, the CRT sought to determine the royalty rate that "copyright owners and users would agree upon in the absence of compulsory license and the presence of copyright liability." NCTA v. CRT, 724 F.2d at 183. The CRT concluded that the marketplace rate would amount to 3.75 percent of a cable operator's "gross receipts" for each "distant signal equivalent" ("DSE"). The 3.75 rate was affirmed by the D.C. Circuit, and Congress rejected the cable industry's legislative efforts to overturn the rate. Furthermore, copyright owners and the cable industry have agreed on three separate occasions (in 1986, 1991 and 1996) not to seek reconsideration of the 3.75 rate. The 3.75 rate, however, applies only to

those signals that Form 3 cable operators were not permitted to carry under the former FCC signal carriage rules.

When adopted by the CRT, the 3.75 rate translated to a monthly royalty, for the average Form 3 cable operator, of approximately 30 cents per subscriber per DSE. Today, the 3.75 rate translates to slightly more than 40 cents for the average cable operator. That 40 cent rate is close to what cable operators pay on average for cable networks whose programming format is most comparable to that of a broadcast station, i.e., USA Network (35 cents) and TNT (54 cents); it is less than the 68 cents per sub fee that must be paid each month for the sports programming on ESPN.

The royalty that cable operators now pay under the Section 111 statutory rates is substantially less than the 40 cent market rate. Depending upon a variety of factors, a cable operator may pay a statutory rate, for each DSE, of anywhere from a few cents to more than 20 cents per subscriber per month. On average, cable operators pay less than 12 cents -- or less than one-third of the market rate. At the present time, the Section 119 rates also are well below marketplace. Satellite carriers now pay only 6 cents for network stations, 14 cents for "syndex-proof" superstations and 17.5 cents for other superstations.

Cable operators and satellite carriers should pay fair market value for all the broadcast programming they retransmit. There is simply no policy justification for requiring copyright owners to continue subsidizing TCI, Time-Warner and the other corporate giants that now dominate the cable and satellite carrier industries. These companies profit from their commercial exploitation of copyrighted broadcast programming and should be required to share that profit in the same manner that they would be required to do so in a free market. The royalty rates in Sections 111 and 119 should be revised to reflect market valuation.

B. Cable Systems and Satellite Carriers Should Be Required To Compensate Copyright Owners For All Works That Are Retransmitted Pursuant To Compulsory Licensing.

Currently, cable operators do not pay any Section 111 royalty to retransmit broadcast programming supplied by the national networks ABC, CBS and NBC -- although they are required to pay compensation for programming distributed by the Fox network. See Distribution of 1990, 1991 and 1992 Cable Royalties, 61 Fed. Reg. 55653, 55659-60 (Oct. 28, 1996). The anomalous result is that Baseball may receive Section 111 compensation for the Fox broadcasts of the World Series but not for the NBC broadcasts of the World Series. In contrast, satellite carriers are required to pay for all programming

distributed by all four national broadcast networks. See 1989 Satellite Carrier Royalty Distribution Proceeding, 56 Fed. Reg. 20414 (May 3, 1991).

Cable systems, like satellite carriers, commercially exploit the programming supplied by all of the national broadcast networks. Cable systems, like satellite carriers, should be required to compensate the copyright owners of all network programming.

Compensation for network programming is particularly appropriate in the case of sports programming. In many instances sports programming is broadcast by networks on a regional basis, i.e., different games are shown in different parts of the country simultaneously. In these cases the stated justification for cable systems not paying for network programming -- that the copyright owner intended nationwide distribution which the cable system is facilitating -- does not apply. Indeed, the retransmission of these signals into certain markets would contravene the intent of the copyright owner.

Likewise, cable systems and satellite carriers should be required to pay compensation when they retransmit a broadcast station into its "local service area." The ability of a cable systems to retransmit "local stations locally" is a major factor enhancing the attractiveness of cable to consumers. Satellite

carriers also believe that they must offer local stations locally to gain substantial market penetration. Cable operators and satellite carriers profit off their exploitation of such local retransmissions and should be required to share that profit with the affected copyright owners.

C. So-Called "Passive" Carriers Should Be Required To Share With Copyright Owners The Substantial Profits That They Receive From Exploiting Those Owners' Works.

There are currently five carriers that retransmit via satellite, to cable systems across the country, the copyrighted programming on selected superstations and network stations; three of these carriers are owned in whole or part by the nation's largest cable operator, Tele-Communications, Inc., which generates annual revenues in excess of \$5 billion. Each of these carriers makes a separate public performance of the copyrighted works on the retransmitted stations. However, relying on the "passive" carrier exemption in Section 111(a)(3) of the Copyright Act, none of the carriers pays any compensation whatsoever to the affected copyright owners.

The carriers argue that copyright owners should be entitled to receive only the below-market compensation provided by cable systems under Section 111. But this argument is contrary to fundamental

principles of copyright law. The carriers are making a separate use of the copyright owners' works. They are commercially profiting from those works.¹ And they should be required to share these profits with the copyright owners whose works they exploit.

D. The Method Of Calculating Cable Royalties Should Be Simplified.

The current royalty rate in Section 111 is calculated from specified percentages of each cable system's "gross receipts from subscribers . . . for the basic service of providing secondary transmissions of primary broadcast transmitters." 17 U.S.C.

§ 111(d)(1)(B). Form 3 cable operators pay royalties based on a highly complicated and technical formula derived both from FCC rules that were in place in 1976 when the Copyright Act was passed and from adjustments made by the Copyright Royalty Tribunal in the period

¹ For example, in 1996 the carrier that retransmits WGN-TV and two other superstations had earnings that were over 60 percent of its revenues -- substantially above that found in other legitimate businesses. See 1996 SEC Form 10k for United Video Satellite Group, Inc. at 30 (filed March 27, 1997). The United Video Satellite Group, Inc.'s UVTV division (whose sole business is retransmitting WGN, WPIX and KTLA to cable systems) had EBITDA ("Earnings before Interest, Taxes, Depreciation and Amortization") of \$16,762,000 on revenues of \$25,997,000 -- for an exceptional margin of 64 percent. As United Video's 10k recognizes, "[f]inancial analysts generally consider EBITDA to be an appropriate measure of performance in the industries in which the Company operates." *Id.* at 30 n.4.

since 1976. The complexity of the current calculation imposes unnecessary costs and burdens in determining how much cable operators must pay for particular signals. As a former Register of Copyrights correctly observed, Section 111

is based on obsolete, outdated, and overruled FCC rules that applied to the cable industry as it existed in 1976 . . . , [and] has long become an archaic beast that produces results at odds with logic and sound copyright policy. . . . The result is a system with marked inequalities, inefficiencies, and illogic, which worsens every year as the old FCC rules and the reality of the marketplace diverge to an increasing degree.

Ralph Oman, Statement Before House Subcommittee on Intellectual Property and Judicial Administration of the House Judiciary Committee 7-8 (Mar. 17, 1993) (describing Section 111).

The current royalty calculation is also subject to manipulation by cable systems through questionable accounting methods, such as "tiering". See Ralph Oman, The Compulsory License Redux: Will it Survive in a Changing Marketplace?, 5 Cardozo Arts & Ent. L. J. 37, 46 (1986). Through "tiering" cable systems can package distant signals subject to the compulsory license in a "basic service" that is offered for a very low fee (which few if any subscribers pay). This practice leads to illogical results where some cable systems pay as

little as a few cents per subscriber per month to retransmit certain distant signals, while others pay as much as 80 cents per subscriber per month for the same set of signals.

Adopting a per subscriber/per signal rate, as in Section 119, would address many of the problems inherent in the current Section 111 royalty calculation.

However, simplification of the rate must ultimately be consistent with the primary goal of ensuring that the rates reflect market valuation. Thus, any revision of the rate calculation must take account of the principles embodied in the 3.75% rate adjustment adopted by the Copyright Royalty Tribunal and affirmed by the D.C. Circuit. See 47 Fed. Reg. 52,146 (Nov. 19, 1982), aff'd sub. nom. NCTA v. CRT, 724 F.2d 176 (D.C. Cir. 1983).

E. Cable Systems and Satellite Carriers Should Be Required To Comply With The Same Types Of Terms And Conditions That Are Normally Negotiated In The Marketplace

The existing Section 111 and 119 compulsory licenses permit copyright owners to receive only a set license fee. In the marketplace, however, licensing agreements contain a number of important provisions in addition to a license fee. Cable operators and satellite carriers should be required to pay not only a license fee but also should be required to comply with

other terms and conditions that are typically negotiated in marketplace transactions.

For example, marketplace license agreements typically prohibit the carriage of certain games in certain markets, thereby preserving the exclusivity licensed to local broadcasters or others. Marketplace agreements also contain a variety of other terms, such as financial audits to ensure proper royalty payments and differing rates tied to various factors.

Other compulsory licenses in the Copyright Act allow for the imposition of terms and conditions in addition to royalty rates. See 17 U.S.C. § 114(f) (procedures for determining "terms and rates" for statutory licenses for certain digital transmissions of sound recordings); 17 U.S.C. § 115(c)(3)(B)-(D) (procedures for determining "terms and rates" for compulsory license for "digital phonorecord deliveries"); 17 U.S.C. § 118(b)(3) (procedures for establishing "rates and terms" for certain noncommercial broadcasting compulsory license). Including such terms and conditions in the compulsory license will better approximate marketplace licensing of copyrighted works.

F. The Substantial Transaction Costs That Copyright Owners Must Now Assume In Connection With Compulsory Licensing Should Be Reduced And Borne More Equitably By Cable Systems and Satellite Carriers.

Congress adopted compulsory licensing in large part to minimize transaction costs. To be sure, this objective has been achieved for cable operators and satellite carriers. Simply by submitting a royalty to the Copyright Office every six months, cable operators and satellite carriers may carry whatever programming they wish without engaging in any negotiations or incurring any other compulsory licensing-related costs (assuming they otherwise comply with applicable law).

The situation is much different for copyright owners. The existing system of compulsory licensing subjects copyright owners to significant and unnecessary transaction costs. To receive their share of royalties, copyright owners must engage annually in negotiations with each other as well as in the development of expensive factual evidence necessary to help determine royalty shares. If negotiations do not produce agreement, copyright owners may then be required to engage in time-consuming litigation before arbitration panels, the Copyright Office and the U.S. court of appeals (the extraordinary costs of which are borne entirely by copyright owners). Throughout this process,

complete distribution of royalties is usually delayed for years.

Countless hours and substantial costs also have been borne by copyright owners in connection with numerous proceedings before the Copyright Office and the FCC related to compulsory licensing; various rate adjustment proceedings; and monitoring compliance by cable operators and copyright owners with Copyright Office regulations. Copyright owners also pay the significant costs incurred by the Copyright Office in connection with the processing of statements of account.

In short, the existing system requires copyright owners to divert enormous resources and pay literally millions of dollars each year to maintain compulsory licensing. Any revision of the compulsory licenses should have the objective of reducing these costs for copyright owners and having those who insist on compulsory licensing bear a more equitable share.

III. If Sections 111 And 119 Are Retained, The Existing Copyright Owner Groups Should Be Permitted To Adopt Tariffs Which Define The Rates And Terms Of Compulsory Licensing.

The objectives described in Section II above would be achieved most efficiently if Congress adopted a system of tariffing.

All copyright owners of the works retransmitted under Sections 111 and 119 are currently organized into a small number of separate ("Phase I") groups, such as the Joint Sports Claimants, Program Suppliers, Commercial Broadcast Claimants, Public Television Claimants and Performing Rights Societies. Each of these groups should be permitted to adopt a tariff, which defines the terms and conditions under which cable operators and satellite carriers may retransmit the works encompassed by that group. Each such tariff may be made be subject to review, under Chapter 8 of the Copyright Act, to ensure that appropriate statutory objectives are satisfied.

A tariff system offers two primary advantages over the system now embodied in Sections 111 and 119. First, copyright owners would have the flexibility to set the types of rates and terms that are typically found in the marketplace. In contrast, cable operators and satellite carriers now pay royalties that are largely the product of government fiat; and, as discussed above, they are not required to comply with any other terms and conditions.

Second, a tariff system would reduce transaction costs. It would avoid the expensive and cumbersome Phase I distribution proceedings because royalties would be paid directly to a particular copyright owner group.

It also would eliminate the substantial costs incurred by the Copyright Office, which currently has the responsibility for administering Sections 111 and 119.


CONCLUSION

The compulsory licenses in Sections 111 and 119 should be eliminated. Cable operators and satellite carriers should be required to negotiate in the marketplace for the right to retransmit copyrighted programming on broadcast stations -- just as they negotiate in the marketplace for the right to retransmit copyrighted programming on non-broadcast services.

If, however, Sections 111 and 119 are retained, their scope should be confined; they should not be expanded to include new technologies, such as the Internet and open video systems. In addition, Sections 111 and 119 should be revised significantly (a) to reduce the substantial transaction costs that are now borne by copyright owners and (b) to ensure that those who exploit copyrighted works pursuant to compulsory licensing pay the compensation, and comply with the terms, that would prevail in a free marketplace. These goals would be accomplished most efficiently through a system of tariffing.

Respectfully submitted,

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April 28, 1997

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APR 30 1997

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REVISED

April 30, 1997

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Washington, D.C. 20540

Comment Letter

RM 97-1

No. 18

Re: Revision of the Cable and Satellite Carrier
Compulsory Licenses. Docket No. 97-1

To Whom It May Concern:

Please find enclosed fifteen (15) copies of a revised written statement of Mark Cuban of AudioNet, Inc., including minor corrections and amendments to the text and an original signature page. These should replace the comments submitted on April 28, 1997.

Should you have any questions, please feel free to contact the undersigned at (202) 778-8088.

Thank you in advance for your assistance.

Very truly yours,



Seth D. Greenstein

Enclosures.

Comment Letter

RM 97-1

No. 18

REVISED

GENERAL COUNSEL
OF COPYRIGHT

APR 30 1997

United States Copyright Office

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In the Matter of:
Revision of the Cable and
Satellite Carrier Compulsory
Licenses

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Docket No. 97-1

**Statement of Mark Cuban
President, AudioNet, Inc.**

On behalf of AudioNet, the largest broadcast network on the Internet, I would like to thank you for this opportunity to submit written comments concerning the copyright licensing of broadcast retransmissions. In particular, my comments will address the need to extend compulsory licensing obligations to broadcasts over the Internet.

Summary of Testimony

In the not-so-distant future, broadcast of video retransmissions via the Internet in high-quality, full-screen display, will become a technological and economic reality. If one of the goals of broadcasting is to reach the largest potential audience -- to increase the flow of information and to promote public discourse and speech -- then Internet broadcasting should be welcomed as a new market for broadcasters and rebroadcasters that benefits the public. Many of the same policies that have fostered the proliferation of cable systems also should be extended to Internet broadcast, and in particular the system of making broadcasts available for retransmission by compulsory licensing. Because Internet broadcasting generally obtains its revenues through advertising rather than subscriptions, a different royalty model should be adopted. Given the international scope of the Internet in contrast to the local nature of cable and satellite transmissions, "must carry" rules should not apply to Internet broadcasting.

Background of AudioNet

AudioNet, at <http://www.audionet.com>, is one of the 50 most visited websites on the Internet. AudioNet broadcasts audio and video events in real time via the Internet, to anyone anywhere in the world who has a computer with audio capability and access to the World Wide Web. Attached is our most recent e-newsletter to give some idea of the breadth and nature of our service.

Historically, AudioNet has broadcast several different types of audio events to the public:

- Network feeds of major league sporting events. For example, AudioNet carries live broadcasts of major sporting events such as the Super Bowl, World Series, NBA Playoffs, Stanley Cup playoffs and NCAA Basketball Championship games, as well as individual major league sporting events.
- Audio of cable television programming. Recently, AudioNet began 24-hour audio simulcasting of C-SPAN I and II, including Senate and House proceedings.
- Local radio stations carrying talk radio programming, sports events and music. Listener comments indicate that people from all over the world tune in to hear broadcasts from their home towns, college sporting events from their alma mater, talk shows and interview programming, or types of musical formats unavailable in their local area.
- Conferences, such as press conferences, governmental hearings, shareholder meetings, etc.
- Live concert events of major, up-and-coming and alternative music artists.
- Internet Radio stations, including original music programming.
- The AudioNet Jukebox, featuring more than 1000 compact disc recordings from more than 30 recording companies, and hundreds of different artists.

These broadcasts have been made possible by the development of streaming audio technology. Consumers initially experienced audio over the Internet by downloading entire files. This was extremely time-consuming and wasteful of disk space for the user. It also required the distribution and copying of each work to every user, resulting in the loss of some measure of control by the copyright owner over the work.

Streaming technology vastly improved the Internet multimedia experience by permitting the sending of audio and audiovisual programming virtually in real time. The software establishes a temporary "buffer" of memory in the user's computer random access memory, to which the Internet site downloads a few seconds of data. As the programming is played from the buffer, the Internet site replaces the played material with the next few seconds of data. The buffer continually is refreshed in this manner, resulting in a continuous real time playback to the user -- although only a few seconds of the programming actually reside on the user's computer at any time.

Recently, AudioNet has begun expanding its broadcasts into video programming. Our most ambitious effort to date, appropriately enough, was our real-time presentation of the National Association of Broadcasters convention in Las Vegas, including keynote speeches, press conferences and seminar presentations. Since this first event just three weeks ago, AudioNet has broadcast another 50 live video events, plus video program channels such as the MSNBC Game Show Network.

At present, the technology permits display on only a small portion of the video screen, in less than full motion video. But just a short time ago, such broadcasting seemed beyond the reach of the average computer user. Today, it is on the desktop and in the home, on any Pentium PC with a 28.8k baud Internet connection, using browser software and Microsoft's NetShow software, made available to the public by free download. Computer hardware, digital video compression methods, modem speed and bandwidth are progressing full bore toward the capability of reproducing full motion video on a full video display screen in real time. The average consumer PC in 1998 will run at 200 MHZ or faster, and will have at least 32 megabytes of random access memory, extra video memory capacity, and microprocessors specifically designed for reception and performance of video. Already, 56k baud modems are becoming the norm.

High-speed Internet connections such as ISDN to the home and T-1 telephone lines to office are becoming less expensive and increasingly common. It is easy to foresee, probably within two-to-three years, that the personal computer will be capable of displaying full screen real time television broadcasts with quality exceeding the current NTSC television standard, and well on its way toward implementing advanced digital television standards.

Indeed, at the NAB convention, major computer and software vendors presented their vision of digital television delivery combining the experiences of television and interactive Webcasting, using the personal computer as the primary display platform. This trend toward convergence is evident in the recent merger of Microsoft and WebTV, and the announcement that Intel Corporation will begin enabling the inclusion of interactive elements in MTV telecasts, including artist, recording and concert information, which would be available to the user at the click of a mouse.

AudioNet believes, therefore, that distribution of television programming via the Internet is not far away in our future, and that it will be of great benefit to the programmers and the public. But Internet Broadcasting isn't just about watching "Seinfeld" on your computer.

We see the real value of Internet broadcasting in several key capabilities:

- Virtual Ubiquity. The Internet makes television programming available to places where television signals cannot reach, at a lower cost than cable or satellite service. For example, many people currently are unable to receive television or radio signals in their offices, due largely to problems of signal strength or cost. Yet, each of these offices has a telephone system or high speed data network capable of carrying television and radio to the desktop computer. Increasing the availability of television to people during the work day serves the public interest -- much in the same way that cable and satellite service was deemed to serve the public interest by delivering television signals where over-the-air broadcasting could not reach. Thus, news, government proceedings and business information can be broadcast to the office environment efficiently and cheaply.

- **Virtual Globalization of Localized Broadcasting.** The Internet brings local experiences and interests to the international audience. It will enable users to watch local television programming from anywhere in the world. Former residents of Grand Forks, North Dakota, for example, would be able to see extensive local television coverage of the effects of the flood, rather than just rely on short network news blurbs. When a local high school football team is on its way to the state championship game, former residents from all over the country can tune in to the celebration. Government officials and political advisers will be able to obtain a better understanding of the local reaction to regional and national issues affecting their constituents. Traveling to another city? Check out the local weather and weekend events. The broad appeal of local programming has been one engine of success for AudioNet's radio broadcasts. We fully expect that consumer interest and demand for local television programming will be a substantial factor driving the market for video broadcasts via the Internet.

- **Virtual Universities.** Governments, educational institutions and corporations are devoting substantial capital and efforts toward the use of computers in long-distance education. Western governors, for example, are focusing attention on the concept of a "Virtual University" to serve rural and remote regions. Such specialized programming easily and economically can be carried by the Internet. Only 65% of America has cable or satellite television service, but 98% have telephones which facilitate access to the net and hence the broadcasts. Moreover, the national and international reach of the Internet makes niche and specialized educational television programming economically viable.

- **Virtually Limitless Market.** The Internet breaks down some of the most costly barriers to distribution of local and small-scale television productions. Programming can be transmitted to a global audience over the Internet at a very low cost. Any Internet Service Provider can become the equivalent of a broadcast network facility. With low cost and abundant transmission facilities, there is no limit to the number of virtual broadcast stations that can be created. Hence, more community interest channels can be developed and local and

special interest programming can be more commercially viable over the Internet than current cable access channels.

Need for Compulsory Licensing

In response to issue A.2 identified in the Federal Register Notice, AudioNet believes the need exists to preserve and extend a system of compulsory licensing for those who wish to broadcast via the Internet. The same reasons that spurred adoption of compulsory licensing regimes for cable and satellite services now commend their adoption for Internet broadcasting. Internet broadcasters are bringing important new capabilities to the marketplace, and have the potential to substantially expand the audience for a wide range of local and specialized television programming. This can only happen under a licensing system that facilitates access to programming at predictable and reasonable prices.

The current licensing scheme was designed to eliminate the inherent logistical and economic difficulties and competitive disadvantages in negotiating and obtaining licenses to carry television programming on cable and satellite systems. With the advent of digital TV, expansion of satellite capacity, and advances of the technology on the Internet, it will be possible to broadcast a large number of television stations; however, it will be practically impossible to negotiate individual licenses with each carrier. In the future, licenses will not be limited to a few of cable broadcast networks, plus the existing local UHF and VHF stations. Broadcasting will expand to include dual versions of each, the digital version and the analog version, plus the dual versions of channels that fill the ever expanding universe of television channels. It is not inconceivable over the next 10 years that more than 10,000 channels will exist. It would be impossible to negotiate licenses with even a substantial number of television program providers in the absence of a compulsory licensing system.

Equally important, a small, young company such as AudioNet could easily be foreclosed from participating in Internet broadcasting in the absence of compulsory licensing. As the broadcasting industry consolidates, as program producers join together, and as large content providers extend their business reach into broadcasting and Internet systems, they may intentionally withhold the rights to their programming and use it to exploit new technologies to the exclusion of satellite cable, and Internet broadcasters such as AudioNet. This potentially could preclude the entry into the Internet market of small, entrepreneurial competitors,

and could hamper our company's ability to license a wide variety of local programming over the Internet.

To enable access to programming for Internet distribution, compulsory licensing is necessary. The establishment of compulsory licensing systems should lead to the development of practical means of such licensing, such as a collective administration system (similar to ASCAP or BMI for musical works), a clearinghouse (such as Copyright Clearance Center for publications) or the right of other retransmitters that already have obtained compulsory licenses to programming (such as cable or satellite systems) to sublicense their feeds to Internet broadcasters.

However, the royalty model for the compulsory license to Internet broadcasters cannot be the same model applicable to satellite or cable systems. Internet broadcasters, to date, do not sell "subscriptions" as do cable and satellite systems. Like over-the-air broadcasters, AudioNet obtains revenues by selling advertising space on its web pages, based on the number of anticipated "hits" or visits to the AudioNet site. To date, AudioNet has been successful in its efforts to provide a wide variety of content to its audience, and to serve its advertising base. However, the concept of Internet advertising on websites is still rather new. AudioNet believes, therefore, that royalties for compulsory licenses should be based either as a low flat fee or as a small percentage of advertising revenue, and that the rates should reflect the experimental nature of Internet video broadcasting.

"Must Carry" Rules Should Not Apply to Internet Broadcasting

In response to question A.3, the purpose of "Must Carry" regulations is irrelevant in the context of Internet broadcasting. Cable and satellite systems serve audiences in specified geographical areas. By contrast, Internet broadcasting by its nature is "without boundaries." It would likely be physically and economically impossible for any Internet broadcaster to carry all local channels in every market in which Internet access was available.

Nevertheless, Internet broadcasters do serve the underlying purpose of the must carry rules, by promoting the national communications policy to ensure the widest possible dissemination of information from diverse and antagonistic sources, which is essential to the public welfare. See Turner Broadcasting System v. Federal Communications Comm'n, 95-992, Slip. Op at 8 (March 31,

1997). Indeed, the availability of local programming via the Internet will strengthen local broadcasting by making its programming available to a wider audience.

For these reasons, Internet broadcasters should be exempt from the must carry rules.

Cable Compulsory License Should Extend to Internet Broadcasters

As stated above, Internet Broadcasters need a compulsory license in order to establish this new expansive means of distribution. Congress has proved willing in the past to extend the cable compulsory license to new distribution means, as it did in 1994 for satellite broadcasters. The same should be done with respect to Internet broadcasters. Any necessary amendments to 17 U.S.C. § 111(a)(3) should be adopted to accomplish this.

At this time, AudioNet believes that any response to the questions posed by the Copyright Office in section B.3 of the Notice will be preliminary. It is our view that there should be no restriction on the number of signals to be carried, because the technology and the market itself will provide any necessary limits. For example, the server of a particular service may or may not be able to accommodate a large number of video channels and, so, will provide a natural restriction on the number of channels to be carried. Similarly, the number and selection of channels may be limited by the ability of the Internet broadcaster to attract advertising to its service for that particular channel.

As to the method of royalty, clearly there would be a great benefit to the Internet broadcaster if a maximum capped fee were adopted that could then be apportioned among the channels according to the number of hits to the particular channel. This could be expressed as a reasonable flat fee for all channels or percentage of advertising revenue attributable to each channel.

The experimental and entrepreneurial nature of Internet broadcasting suggests that the compulsory license should be set in perpetuity, or at minimum for 20 years, to allow development of the Internet broadcast market. AudioNet believes that a significant period of time will be needed, first, to develop and

"prove out" the technology; second, to allow the technology to penetrate into the marketplace such that a substantial number of consumers will be able to receive the broadcasts; and, third, to permit the business model for Internet broadcasting to take hold and prove itself to be viable. We suggest that Internet broadcasting, for an initial period of at least 12 years after its inception, should be subject to minimal regulation and low royalty payments. Royalty rates could be re-evaluated thereafter, once it could reasonably be determined whether the market for Internet broadcasting will be viable as a long-term business model.

Conclusion

Internet broadcasting offers local broadcasters the potential to reach a large international audience in a way that will enhance the broadcasters themselves and the broadcast market in general. AudioNet believes that this market cannot develop unless compulsory licensing is available. Therefore, the cable compulsory license should be extended and expanded to include Internet broadcasters.

Although Internet television broadcasting is still under development, it is not too early to begin to craft the legal regime to support its realization. We therefore thank the Copyright Office for its interest in this issue, and for this opportunity to submit these comments.

Respectfully submitted,



Mark Cuban
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REVISED

AudioNet Weekly Newsletter
April 25, 1997
<http://www.audionet.com/>

Comment Letter
RM 07-1
No. 18

GENERAL COUNSEL
OF COPYRIGHT

APR 30 1997

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+ All times Central Standard Time +

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FEATURED EVENT - NEW ORLEANS JAZZ AND HERITAGE FESTIVAL

April 25 - May 4 - 11:00 am - 7:00 pm

From April 25th through May 4th, WWOZ will be the exclusive broadcaster of the New Orleans Jazz and Heritage Festival, the internationally renowned music festival that draws thousands of people from around the world. Can't make it to the Crescent City? Join AudioNet for the event that Life magazine has called "the country's very best music festival," featuring 28 live performances from the festival covering Blues, Traditional Jazz and Contemporary Jazz. For a complete schedule of artists and performance times, go to: <http://www.audionet.com/concerts/heritage/>

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VIDEO EVENTS WITH MICROSOFT NETSHOW

Mon. April 28 - 4:00 pm

Bill Gates - Microsoft Intranet Technology Seminars

Bill Gates comes to the Greatlakes District! If you've ever been confused as to how to apply the Internet in your organization, then register for one of these three events in Detroit, with keynote speech by Bill Gates. Check them out LIVE using Microsoft NetShow.

<http://www.audionet.com/video/netshow/greatlakes/>

Mon.-Tues. May 5 - 6

Red Herring Venture Market West

At Venture Market West you'll meet CEOs of the most promising privately-held technology companies as they present their business plans and marketing strategies to key members of the investment community. If you can't make it to the conference, you can see and hear the following events with Microsoft NetShow.

<http://www.audionet.com/video/netshow/>

Mon. May 5 - 10:15 am

Opening remarks by John Doerr of Kleiner, Perkins, Caufield & Byers

Mon. May 5 - 3:15 pm

Keynote address by Greg Maffei, Treasurer of Microsoft

Tues. May 6 - 3:15 pm

Industry Panel: Virtual Wall Street. Making sense and dollars of on-line stock trading.

Tues. May 6 - 6:45 pm

Closing remarks: a panel discussion looking back at the new ideas and business models presented at Venture Market West.

Sat. May 17 - 7:00 pm

Listen to a Private Session with Merrill Bainbridge, sponsored by WorldLink, 104 KRBE and the Art Institute of Houston.
<http://www.audionet.com>

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SPORTS

Ongoing AudioNet sports just got cooler! Stanley Cup action has hit the ice. Listen to complete live coverage of all the games of the NHL Stanley Cup playoffs on AudioNet. Find out who'll take home Lord Stanley's Cup.

Will a veteran like Lemieux urge his team to victory in his last season or will the Dallas Stars continue their winning streak?

AudioNet is the only place you have to go to hear all the excitement! Visit the AudioNet NHL page for a complete listing of match-ups and game times.
<http://www.audionet.com/sports/nhl/cup/>

Sat. April 26 - 3:00 pm

Sun. April 27 - 9:00 am

Tomorrow's NFL stars are playing World League Football today and you can hear every game of the season. Saturday the Frankfurt Galaxy take on the Barcelona Dragons. Sunday it's the Rhein Fire against the Amsterdam Admirals.
<http://www.audionet.com/sports/wl/>

Sat. April 26 - 9:30 pm

Don't miss the finals of the Men's Volleyball 1997 PowerBar/Mountain Pacific Sports Federation Tournament as Stanford takes on UCLA. Brought to you by Cable Radio Network.
<http://www.audionet.com/radio/contemporary/crn/>

Sun. April 27 - 1:05 pm

Listen to the Continental Basketball Association's championship game between the Florida Beachdogs and the Oklahoma City Cavalry.
<http://www.audionet.com/events/cba/finals/>

Tues. April 29 - 6:00 pm

Wed. April 30 - 2:00 pm

Outside the Ropes with Bob Bubka takes you to the LPGA Sprint Titleholders Championships for the best in women's professional golf.
<http://www.audionet.com/events/outside/>

Thurs. May 1 -

NCAA Men's Volleyball National Championship Semi-Finals at Ohio State. Brought to you by Cable Radio Network.
<http://www.audionet.com/radio/contemporary/crn/>

Sat. May 3 -

NCAA Men's Volleyball National Championship Finals at Ohio State. Brought to you by Cable Radio Network.

<http://www.audionet.com/radio/contemporary/crn/>

Mon. - Fri. May 12-16

The 1997 Triple Crown is approaching and you can listen to exclusive radio coverage of the Preakness Stakes. Listen to the WBAL crew as they interview owners, trainers, track officials and jockeys. They'll anchor the race from the jockey's terrace located right above the finish line. Brought to you by WBAL Radio, SNI Sports and Pimlico.

<http://www.audionet.com/radio/talk/wbal/>

Ongoing

The boys of summer are back. For a complete schedule of baseball on AudioNet -- the Big Leagues, the minors and NCAA action -- refer to the live sports programming guide.

<http://www.audionet.com/live/default.asp?type=3Dsports>

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BUSINESS

Mon. April 28 - 2:00 pm

Listen as the American Society of Plastic and Reconstructive Surgeons releases the 1996 Procedural Statistics. Representing more than 97% of all board-certified plastic surgeons, ASPRS will provide information on both reconstructive and cosmetic procedures. Brought to you by PR Newswire.

<http://www.audionet.com/events/prnewswire/plasticsurgery/>

Mon. - Wed. April 28-30

U.S. Treasury Secretary Robert Rubin will be the keynote speaker at The Society of American Business Writers and Editors (SABEW) annual awards dinner. SABEW invites you to hear their annual meeting. Brought to you by PR Newswire.

<http://www.audionet.com/events/prnewswire/sabew/>

Mon. April 28 - 9:00 am

"The State of the Markets." Speakers will be:

Richard Grasso - chairman and CEO of the New York Stock Exchange

Sanford I Weill - chairman and CEO of Travelers Group

David Komansky - president and CEO of Merrill Lynch.

Mon. April 28 - 5:00 pm

"View from the Top of Business Journalism." Leading journalism experts will share their views about directions for business news into the next century. Panelists include:

Mike Kandel - Cable News Network,

Alex Jones - National Public Radio

Marshall Loeb - Columbia Journalism Review

Steve Brill - American Lawyer

Tom Goldstein - Columbia Graduate School of Journalism.

Tues. April 29 - 8:30 am

"Business Journalism: Best of Times or the Worst of Times?" A panel of daily business journalists and recovering daily journalists will talk about the career and advancement opportunities their profession has to offer. Moderator will be Susan Wells of the Atlanta Journal Constitution.

Wed. April 30 - 8:00 am

"New Business News Ventures." Jim Kennedy of The Associated Press will moderate a panel discussion about Internet publishing and new media.

Wed. April 30 - 10:00 am

"Used Cars, New Story." Marshall Cogan, chairman of United Auto Group, will discuss how a group of entrepreneurs is changing the culture of car sales with a supermarket approach.

Thurs. May 1 - 4:00 pm

Check out the first ever live AudioNet recruitment broadcast. Listen as Andrew Harris, CEO Hand Technologies and Bob Miltenberger, Business Development Manager, Lucent Technologies talk about the future growth of their companies and the opportunities that growth means to you, the job seeker. You'll get helpful tips from world.hire's CEO and former high-tech recruiter Hank Stringer, to help you in your job search.

<http://www.audionet.com/>

Wed. April 30 - 7:30 am

PR Newswire invites you to a Media Coffee with MSNBC. MSNBC is a joint venture between NBC, a leading provider of news and information, and Microsoft, the leader in personal computer software and major provider of Internet online services. Built on the worldwide resources of NBC News, MSNBC is a 24-hour cable news network and an Internet news service at www.msnbc.com. MSNBC on the Internet is the number 1 rated news service on the Net and has won numerous awards for its outstanding news coverage, including AOL Members' Choice Award, NetGuide's Platinum award and a Best On The Web.com award.

<http://www.audionet.com/events/prnewswire/msnbc/>

Tues. May 6 - 1:00 pm

Listen to Speedware's 2nd Quarterly Earnings Call for fiscal results and other recent news highlights. E-mail your questions and comments throughout the broadcast.

<http://www.audionet.com/events/speedware/2nd/>

Thurs. May 8 - 1:00 pm

The ecommerce eSeminar Series gives you direct access to the people who created and took early advantage of the opportunities presented by Internet commerce. Listen to live guests who will provide perspectives from some of today's leading technology companies. This week's guest, James T. Pollard of Tech Data Corporation, will discuss "The Impact of Ecommerce on Wholesale Distribution."

<http://www.audionet.com/events/calicotech/>

Wed. May 14 - 7:30 am

Listen to "Targeting Your Health Care Message: Breaking Through the Clutter," a conference discussing the interaction between health care media and PR professionals in a marketing-oriented, information-filled society.

<http://www.audionet.com/events/prenewswire/westglen/>

Wed. May 14 - 8:00 am

Sit in on Bell & Howell's Annual Shareholder's Meeting. For the first time ever, qualified shareholders can vote their proxy online.

<http://www.audionet.com/events/bellhowell/meeting/>

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MUSIC

Sat. April 26 - 8:00 pm

Join WFMT, Chicago's classical music station, for a live broadcast from Chicago's Old Town School of Folk Music, celebrating the school's 40th anniversary. Contemporary folk music legends Tom Paxton, Jim Post, Odetta, Frank Hamilton and others will be performing.

<http://www.audionet.com/radio/classical/wfmt/>

Fri. - Sat. May 2-3 - 9:30 pm

A&M recording artists Jackopierce perform live from Trees in Deep Ellum, TX.

<http://www.audionet.com/concerts/trees/jackopierce/>

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EDUCATION

Thurs. May 8 - 9:30 pm

Listen to "Other Perspectives on the Holocaust," a reading of selected poems written during and about the Holocaust from the Simon Wiesenthal Center. Renowned author Dr. Charles Fishman will be in attendance.

<http://www.audionet.com/events/swc/poetry/>

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SHOWS

Weekdays - 11:00 am

You can now hear Rush Limbaugh LIVE on AudioNet! Jacor Communications presents Rush Limbaugh live on AudioNet. You can hear him every day from KSDO in San Diego, or WGST in Atlanta.

<http://www.audionet.com/shows/rush/>

Wednesdays- 5:00 pm

In the Crease with JD gives you all the hockey news you need to hear with the Stanley Cup underway. Television analyst John Davidson gives you the Inside Scoop on the NHL.

<http://www.audionet.com/sports/nhl/crease/>

Sat. April 26 - 11:00 am

Pat & Mike dissect the Web each week with wit and irreverence. This week's guests include Joseph Diamond, Executive Director for Parole Watch, Jennifer Gainsborough, Public Policy Administrator for the National Prison Project of the ACLU, Dave Thau, Co-founder of Bianca's Smut Shack and R.U. Sirius, Co-founder and original Editor-in-chief of Mondo. Tune in this to win a fabulous free prize just for listening to one of the most informative Internet shows around.

<http://www.audionet.com/shows/pat%26mike/>

Sun. April 27 - 8:00 pm

Listen to Pat Summerall's Sports in America for the latest in sports news.

<http://www.audionet.com/sports/shows/summerall/>

Fri. May 2 - 6:00 pm

Listen to a discussion of American composer Stephen Foster on Ann On-Line.

<http://www.audionet.com/shows/annonline/>

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KENNEDY SCHOOL OF GOVERNMENT

Mon. April 28 - 6:00 pm

Harvard's Kennedy School of Government presents a panel discussion on Cult Awareness with Cynthia Kisser, former executive director of a national cult advocacy group and Peter Klebnikov, an investigative reporter featured in Newsweek.

<http://www.audionet.com/events/ksg/>

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LIGHTSOURCE ON AUDIONET

LightSource on AudioNet--The Best Christian Programming on the Internet.

<http://www.audionet.com/lightsource/>

For a limited time, listen to the Gospel Music Association's 28th annual awards show recorded live from Nashville. Internet broadcast sponsored by World Vision and hosted by Scott Wilder.

<http://www.audionet.com/lightsource/dove/>

Listen to full-length CDs by your favorite CCM artists--Amy Grant, 4Him, Michael W. Smith, and more.

<http://www.audionet.com/lightsource/>

EWTN AM/FM is part of Eternal Word Television Network (EWTN), America's largest religious cable network and features programming for the entire family. Listeners will find, 24-hours a day, popular call-in shows, exciting talk shows, Scripture and teaching programs, as well as a news show offering summaries of the latest developments from the Vatican and feature stories from around the world.

<http://www.audionet.com/lightsource/ewtn/>

Coming Soon!

KKLA 99.5 FM--The Talk of Los Angeles--America's number one Christian talk station, with 24 hours of great talk programming every day.

WMBI 90.1 FM-- Moody Bible Institute's Flagship Station "Radio for the Heart of Chicago"

The 700 Club--Daily program with Pat Robertson from The Christian Broadcasting Network (CBN)

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THE AUDIONET RADIO NETWORK

This week AudioNet features our classical stations, part of our extensive network of 150 stations.

<http://www.audionet.com/radio/>

WFMT 98.7 FM - Chicago, IL

Chicago's Fine Arts Station.

<http://www.audionet.com/radio/classical/wfmt/>

WFLN 95.7 FM - Philadelphia, PA

The Classical music station in Philadelphia.

<http://www.audionet.com/radio/classical/wfln/>

KRTS 92.1 FM - Houston, TX

All Classical. All the time.

<http://www.audionet.com/radio/classical/krts/>

KLASI 100 FM - Dallas, TX

24-hours-a-day of Classical Music. Never a commercial interruption.

<http://www.audionet.com/radio/classical/klasi/>

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THE AUDIONET CD JUKEBOX

The AudioNet Jukebox contains some great artist discographies including:

Styx - 10 CDs

<http://ww2.audionet.com/jukebox/styx.htm>

Patti Smith - 6 CDs

<http://ww2.audionet.com/jukebox/patti.htm>

Tangerine Dream - 5 CDs

<http://ww2.audionet.com/jukebox/dream.htm>

And listen to this week's Jukebox feature, "The Squirrel Nut Zippers." We also have secure on-line ordering or you can order CDs by phone or fax.

<http://ww2.audionet.com/jukebox/>

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AUDIOBOOKS

The AudioBooks site is back and more popular than ever! There are over 150 AudioBooks in our "virtual library." Stop by and check out favorites like=

Jack London's Call of the Wild and Albert Einstein's Relativity.

<http://www.audionet.com/books>

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SUBSCRIPTIONS

To unsubscribe to this newsletter, send an email to:

listserv@mailhost2.audionet.com

Please turn off all signatures and type only the following text in body of the note:

SIGNOFF gbook

In other words:

Your "To" line should read: listserv@mailhost2.audionet.com

Your "From" line should have your email address.

The "Subject" line can be blank or have a descriptive message.

The "Body", that is the actual text of your reply should contain only one line with EXACTLY this text: **SIGNOFF gbook**

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QUESTIONS AND COMMENTS

Send an email to:

newsletter@audionet.com

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FLEISCHMAN AND WALSH, L. L. P.

APR 28 1997

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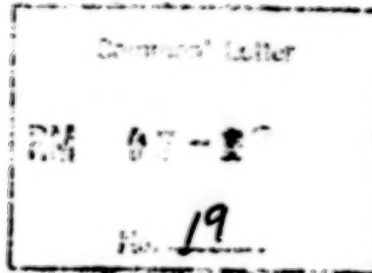
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MITCHELL F. BRECHER

JAMES F. MORIARTY

MATTHEW D. ENMER

HOWARD A. TOPEL



April 28, 1997

JILL KLEPPE MCCLELLAND

REGINA FAMIGLIETTI PACE

TERRI B. NATOLI *

RHETT D. WORKMAN

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SCOTT H. KEBBLER ***

RUBY D. CEASER

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LORETTA J. GARCIA

DEBRA A. MCGUIRE

JOSHUA W. RESNIK ****

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** PA BAR ONLY

*** NY AND NJ BARS ONLY

**** ND BAR ONLY

Nanette Petruzzelli, Esq.
Acting General Counsel
Copyright Office
James Madison Memorial Building
Room LM-403
First and Independence Avenue, SE
Washington, DC 20540

Re: Revision Of The Cable And Satellite Carrier Compulsory Licenses
Docket No. 97-1

Dear Ms. Petruzzelli:

Please find enclosed for filing in the above-referenced proceeding an original and fifteen copies of the Comments of Primestar Partners, L.P.

If there are any questions regarding this matter, please communicate directly with the undersigned.

Sincerely,

Aaron I. Fleischman

Enclosures

Comment Letter
RM 97-1
No. _____

Before the
Copyright Office
Library of Congress
Washington, D.C.

ORIGINAL

GENERAL COUNSEL
OF COPYRIGHT

APR 28 1997

RECEIVED

In the Matter of)	
)	
Revision of the Cable and Satellite)	Docket No. 97-1
Carrier Compulsory License)	

COMMENTS OF PRIMESTAR PARTNERS, L.P.

These comments are submitted by Primestar Partners, L.P., a limited partnership of which the partners are several cable television multiple system owners and an affiliate of General Electric. Primestar provides its DTH service to approximately 1.7 million subscribers located throughout the United States. Primestar currently uses the twenty four (24) transponder GE-2 medium power satellite to deliver its service to customers. Primestar currently provides its customers with access to up to 160 programming channels, some of which are superstations and others are distant network stations delivered to subscribers located in "white areas." As such, Primestar has a direct interest in the recommendations that the Copyright Office will make in this proceeding, particularly those which affect the compulsory license granted to direct-to-home satellite programming providers under Section 119 of the Copyright Act.

From its inception in 1988, the Satellite Home Viewer Act (codified in Section 119 of the Copyright Act) has provided satellite programming providers with a compulsory license only for a fixed term. This limited term license consequently has necessitated Congressional intervention to extend this compulsory license every time the end of the current license term draws near. It is also clear from the periodic industry negotiation and arbitration proceedings

to set rates for the retransmission of broadcast signals that Congress' hope that the marketplace would provide realistic, feasible alternatives for obtaining these rights will not be realized in the foreseeable future. Accordingly, the compulsory license granted in Section 119 must be viewed as a long-term solution to the clearance of rights for satellite distant signal retransmission rather than simply a transitional mechanism. DBS operators will not be able to obtain the permission of copyright owners to retransmit distant television broadcast signals without the compulsory license. Since distant signals are a valuable part of the service provided by DBS operators, the competitive ability of DBS service would be severely harmed by the absence of the compulsory license. This is particularly important in view of the fact that both Congress and the FCC view DBS as a budding competitor to cable television and other multichannel video programming distributors. Therefore, Primestar submits that Section 119 should be amended to remove the sunset provision.

Section 119 limits reception of distant network signals to only those households that cannot receive a local network signal of Grade B intensity. This restriction has been traditionally difficult to administer, has resulted in limiting the programming choices of some prospective satellite customers, and has been the subject of severe disagreement between the satellite and broadcast industries. This situation has recently come to a head and the disputing parties have been engaged in ongoing negotiations to arrive at a satisfactory marketplace solution. Primestar is encouraged by the progress which has been made in these negotiations and is hopeful that a satisfactory solution can be formalized shortly. Accordingly, Primestar believes that it is premature for the Copyright Office to recommend a particular "fix" to this problem for Congress to enact. Instead, Primestar believes that the negotiations should be

permitted to run their course and once the principal parties have arrived at a satisfactory *modus vivendi*, Congress should then consider the codification of this solution in the Copyright Act.

Finally, Primestar believes that the current rate determination provisions in Section 119 are unworkable and should be amended. The royalty rates under the satellite compulsory license are determined through voluntary negotiations followed by compulsory arbitration if the negotiations are not successful. Unfortunately, voluntary negotiations have never succeeded and each arbitration has resulted in a significant increase in the rate paid by DBS operators as well as the imposition of considerable administrative costs. Currently, such an arbitration proceeding is ongoing and Primestar expects the rates to increase again. The reason that Congress originally required voluntary negotiations followed by compulsory arbitration was a commendable effort to encourage the industries to come up with an alternative marketplace mechanism to license the retransmission of broadcast signals. It has been almost ten years since Section 119 was originally enacted and the copyright owners and the satellite distributors have made virtually no progress to develop such alternative means. Therefore, like cable television operators, DBS must rely on a compulsory license. Primestar therefore believes that the voluntary negotiation and compulsory arbitration process of Section 119 is no longer a justifiable way to determine the compulsory license rates.

Primestar urges the Copyright Office to recommend the establishment of an alternative method of setting rates. Primestar's suggestion is that a new equitable statutory base rate be established and that such base rate be adjusted periodically, perhaps every three years, according to a defined variable such as inflation or cost of living. This would remove the need for further government involvement in setting the compulsory license rates and would certainly be far easier to implement. Most importantly, however, it would permit DBS operators to plan with more

certainty. Primestar is mindful of the fact that a statutory rate would not be a "market" rate, but rather a "fair" rate. It would be impossible to emulate a market rate in the DBS context because the price for a particular program would differ among DBS operators, and the price among programs would differ greatly. The concept of fair compensation is not alien in the copyright law. That is precisely what has been done in cable television. One indication of the reasonableness of this approach is the fact that neither the cable operators or the copyright owners have asked for rate adjustments for several years.

Respectfully submitted,

PRIMESTAR PARTNERS, L.P.

Marcus O. Evans (LSE)

Marcus O. Evans

Senior Vice President & General Counsel

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Dated: April 28, 1997

52028

ABC, Inc.

Charlene Vanlier
Vice President & Washington Counsel
Government Affairs

Comment Letter

RM 97-1

No. 20

April 28, 1997

GENERAL COUNSEL
OF COPYRIGHT

APR 28 1997

abc

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ORIGINAL

Mary Beth Peters, Esq.
Register of Copyrights
Copyright Office, Library of Congress
Room LM-403
Washington, DC 20540

Dear Ms. Peters:

RE: COMMENTS OF ABC, INC. REGARDING THE REVISION OF THE CABLE
AND SATELLITE CARRIER COMPULSORY LICENSES, Docket No. 97-1

Attn.: Ms. Nanette Petruzzelli, Acting General Counsel and Mr. Bill Roberts, Senior
Attorney for Compulsory Licenses

ABC, Inc. offers this response to the questions raised in your notice of public meetings and request for comments. In these opening comments, ABC proposes a conceptual framework that we believe should govern the analysis of those questions. We hope that this framework will contribute to the important work you are undertaking.

Sincerely,

Char. Vanlier

Charlene Vanlier

COMMENTS OF ABC, INC. IN RESPONSE TO THE
COPYRIGHT OFFICE, LIBRARY OF CONGRESS
NOTICE OF PUBLIC MEETINGS AND REQUEST FOR COMMENTS RE:
Revisions of the Cable and Satellite Carrier
Compulsory Licenses
Docket No. 97-1

- I. General principles that should govern the establishment of any compulsory license access to over the air broadcast programming.
 - A. As the Copyright Office has long and consistently recognized compulsory licenses are an exception to copyright law and a departure from marketplace principles. They should be used only when absolutely necessary and should be narrowly construed.
 - B. Principles that should govern the application and formulation of compulsory licenses in a manner that avoids/minimizes marketplace distortions.
 1. The Copyright Office should take a fresh look at the need for and scope of compulsory licenses based on current marketplace realities.
 2. A compulsory license should never be considered a permanent entitlement to the use of another's property rights.
 - a. Such limited licenses should be periodically reviewed and continued only if Congress finds justification and acts to extend licenses accordingly.
 - b. Congress adopted this view in SHVA in 1988 & 1994.
 3. To prevent market distortions, the Copyright Office should analyze separately the application of a compulsory license to:
 - a. The redistribution of over-the-air broadcast stations within their local markets;
 - b. The redistribution of over-the-air broadcast stations into distant markets; and
 - c. The redistribution of over-the-air network station signals to unserved households in distant markets.
- We respond in detail to the first of these questions and will reply in detail to comments submitted regarding the remaining questions.

4. The potential for market distortions are dramatically different in each of these spheres of redistribution. We propose that the Copyright Office address them distinctly in its review of under what terms and subject to what limitations a compulsory license may be appropriate.
5. Market distortions can also arise from the failure to set rates at fair market value, as Congress recognized in the 1988 amendments to SHVA.
6. Where a license exists, significant penalties should apply to distribution outside the authorized exception:
 - a. Massive violations of SHVA by Prime Time 24 and others illustrate the importance of this point.
 - b. We align ourselves in the strongest possible terms with the NAB and NASA comments about abuse of SHVA and potential solutions.

II. Application of these general principles to today's marketplace.

- A. The conceptual framework we have recommended based on longstanding Copyright Office policy, provides a useful and appropriate framework with which to answer the questions that the Copyright Office has raised.
- B. As a general rule, any compulsory license established under the principles stated above should apply only to those multichannel video programming distributors¹ (MVPD's) that, like cable, deliver only to local service areas and are able to enforce exclusivity rules.

¹ The term "multichannel video programming distributor" or "MVPD" refers to the meaning given such term in the Cable Television Consumer Protection and Competition Act of 1992, PL 102-385 (47 USC 522) ("For purposes of this title - (12) The term "multichannel video programming distributor" means a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming;"). Section 325 of the Communications Act, 47 USC 325, establishes a retransmission consent right for broadcasters that applies to all MVPD's (exceptions apply in four circumstances). ABC, Inc. believes this term is consistent with that used by the Copyright Office, "broadcast retransmission services", in the notice and uses MVPD only to suggest and facilitate the use of common terms in the copyright and communications discussions of related issues.

1. Over the past twenty-one years, Congress, the Copyright Office and the FCC have developed a policy that limits cable distribution pursuant to a compulsory license to the market already served by the local over the air television stations (except for the importation of distant signals that do not violate the exclusivity conferred on local stations by statute and FCC regulation). Compulsory copyright should be extended only to MVPD's that offer similarly constrained geographical distribution. Thus, at a minimum the:
 - a. MVPD must be able to deliver signals within the confines of a "local market"; and
 - b. MVPD must comply with those communications policies designed to protect the exclusivity of the broadcaster's signal in its market (network non-duplication, syndex, sports blackout).
2. Somewhat different rules have been developed for the satellite dish industry. But if complied with, those rules are consistent with the framework we advocate.
 - a. Like the rule developed for cable, the "unserved household" limitation in Section 119 is designed to protect local over-the-air television stations. If that limitation were respected -- which it has not been to date -- the limits on network signal delivery to unserved satellite dish households would be essentially consistent in its result with network nonduplication rules.
 - b. Satellite dish distributors have been required to enforce the above mentioned exclusivity rules to the extent technology has previously allowed. Satellite delivery under current law, however, fails to respect a local station's syndicated exclusivity. To the extent that advancements in technology now make the satellite industry capable of complying with such exclusivity rules, the Copyright Office should reexamine the appropriateness of requiring compliance.
3. Under these principles:
 - a. Cable and OVS would be eligible for a compulsory license.
 - b. DBS delivery of local broadcast signals into their local markets could satisfy the test if that system is designed to be consistent with the principles above. There may be other regulatory requirements needed to achieve true competitive equality among competing MVPD's, but that is a matter that Congress must address.

- c. MMDS & SMATV should be required to comply with exclusivity rules before being eligible for any revised license.
- d. The Internet fails to meet both local and exclusivity tests and thus is not and should not be eligible for a compulsory license.

III. Suggested hearing questions.

We urge the office to explore the following questions at the upcoming hearing:

- Is there any justification for continuing the historical failure to compensate the owners of network programming under Section 111?
- Is there any justification for the continued national delivery of sports and other programming via superstations that do not purchase national rights, in light of the resulting economic harm to the owners of such programming and to the competitors who must purchase such national rights?
- Is there justification for failure to compensate copyright owners for the local distribution of broadcast programming?

APR 28 1997

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Comment Letter

RM 97-1

No. 21

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** PA BAR ONLY
*** NY AND NJ BARS ONLY
**** MD BAR ONLY

April 28, 1997

Nanette Petruzzelli, Esq.
Acting General Counsel
Copyright Office
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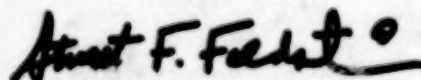
Re: Revision Of The Cable And Satellite Carrier Compulsory Licenses
Docket No. 97-1

Dear Ms. Petruzzelli:

Please find enclosed for filing in the above-referenced proceeding an original and fifteen copies of the Written Statement of Cable Telecommunications Association.

If there are any questions regarding this matter, please communicate directly with the undersigned.

Sincerely,



Stuart F. Feldstein

Enclosures

Comment Letter	
RM	97-1
No.	21

Before the
Copyright Office
Library of Congress
Washington, D.C.

ORIGINAL

GENERAL COUNSEL
OF COPYRIGHT

APR 28 1997

RECEIVED

In the Matter of

Revision of the Cable and Satellite
Carrier Compulsory License

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)

Docket No. 97-1

COMMENTS OF THE CABLE TELECOMMUNICATIONS ASSOCIATION

The Cable Telecommunications Association ("CATA") hereby submits this written statement in the above-captioned proceeding. CATA is a trade association representing owners and operators of cable television systems serving approximately 80 percent of the nation's more than 66 million cable television subscribers. CATA's members will be directly affected by the recommendations made by the Copyright Office in this proceeding.

"If it ain't broke, don't fix it." Or as FCC Commissioner Quello has put it, "If it's not broken, don't break it." The Copyright Office would do well to heed this old adage as it considers what recommendations to make with regard to the cable television compulsory license. Section 111 of the Copyright Act, byzantine as it might seem, was the result of a delicate compromise among many competing interests. This compromise not only included placating the owners and users of the programming material who were arguing over who should pay how much and to whom, but also involved the careful balancing of copyright and communications policies by the FCC and Congress. And, with some minor glitches along the way, Section 111 has worked surprisingly well. It has allowed the copyright owners to be fairly compensated for the use of their works; it removed the unfair libel against cable operators that they were

freeloaders; and it has permitted the FCC and Congress to remove many of the regulatory signal carriage shackles from the cable industry.

Before moving on, we would like to put to rest an old canard which keeps reappearing in different costume, namely, that cable's compulsory license was enacted as a subsidy for the purpose of giving an infant industry a jump-start. Nothing could be further from the truth. By 1976 cable television was a thriving, growing industry. HBO had initiated satellite-delivered programming in 1975 and the industry was entering a new and exciting phase. Most importantly, cable television did not need a compulsory license for the retransmission of broadcast signals because the Supreme Court had twice held that, under the previous copyright statute, cable television was not liable for the payment of royalty fees. Thus, when the cable industry agreed in 1976 to pay royalty fees for the retransmission of broadcast signals pursuant to a compulsory license, this concession was made from a position of strength and was part and parcel of a complex package of compromises and expectations involving several industries.

Getting back to our discussion of Section 111, not only has the FCC's regulatory framework grown up around the existing copyright scheme in the two decades since it was enacted, but also cable operators have made their programming, pricing and tiering decisions at least in part in reliance on Section 111 as we know it. Of equal importance, most cable operators finally know how to fill out the forms. To change, even to tinker, with this scheme carries with it the potential of severely disrupting this state of affairs. And for what reason? The only rationale we have heard consists of some rumblings that perhaps Section 111 should be "harmonized" with Section 119, the direct broadcasting satellite compulsory license scheme. Since "foolish consistency is the hobgoblin of little minds," we would like to disabuse the Copyright Office of any notion that this is a good idea.

The compulsory license schemes in Sections 111 and 119 are totally dissimilar. Satellite carriers can obtain a compulsory license only to retransmit "superstations" anywhere in the country and "network stations" to "unserved households." No license is available for any other station, including any stations (other than superstations) within their local service areas. By contrast, cable systems can obtain a compulsory license to retransmit any domestic television station and, in certain limited circumstances, Canadian and Mexican television stations. Satellite carriers pay royalty fees on a per subscriber basis for each station retransmitted. These fees are subject to change every three years via a negotiation and arbitration process. Cable systems pay royalty fees in one of two ways: (1) smaller systems, depending on their size, pay either a fixed fee or a percentage of their gross revenue derived from the retransmission of broadcast signals no matter how many stations they retransmit; (2) larger systems pay a percentage of their gross revenue from broadcast station retransmission for each distant television station carried, with the percentage varying with the type and number of stations retransmitted. The smaller system definition is enlarged periodically to reflect inflation, while most of the larger system per signal rates are adjusted for inflation and certain others, upon petition, can be adjusted on the basis of "reasonableness" factors by the Copyright Office.

This short synopsis demonstrates the vast difference in the way the two compulsory licenses are constructed and administered. The principal reason for this difference is the unique regulatory regime which applies to each of the two industries. In other words, each copyright scheme is a direct reflection of the regulatory regime under which that industry lives. There is no better illustration of this point than the case of small cable systems, that is, those with less than about 3,500 subscribers. Systems of this size represent 79% of all cable systems nationwide, yet represent only 9.25% of all cable subscribers. These small systems have a

bewildering number of regulatory hoops to jump through. Not only do they have to deal with the local regulatory authority in each and every community where they operate, but they also have to obey an indecent number of federal regulations. Among others, there are rules which mandate that they carry certain television stations, require that they devote a certain percentage of their channel capacity to third party lessees, require that they black out certain programming, require the periodic testing of their systems for compliance with technical standards, require the filing of a number of annual forms, and subject them to rate regulation. For the privilege of complying with all of this burdensome red tape, cable systems get to pay local taxes and franchise fees and \$0.55 per subscriber per year to the FCC. Contrast this to the regulations which govern the direct to home satellite program providers. They have no signal carriage obligations, no leased channel obligations, no program blackout rules, no testing requirements, no forms to fill out, and no rate regulation. And, they pay no taxes or fees to any local authority and the FCC regulatory fees they do pay are a tiny fraction of what cable pays.

Congress was acutely aware of the respective regulatory regimes when it first enacted Section 111 in 1976 and Section 119 in 1988. In the case of Section 111, the 1976 House Report noted that:

...any statutory scheme that imposes copyright liability on cable television systems must take account of the intricate and complicated rules and regulations adopted by the Federal Communications Commission to govern the cable television industry. While the Committee has carefully avoided including in the bill any provisions which would interfere with the FCC's rules or which might be characterized as affecting "communications policy", the Committee has been cognizant of the interplay between the copyright and the communications elements of the legislation.

What all this says is that you can't even start to talk about "harmonizing" the two compulsory licenses until the FCC and Congress address that "interplay" and the current regulatory disparity. To prematurely address this topic makes "putting the cart before the horse" seem reasonable.

As an aside, and in order to demonstrate the difficulties involved in even trying to "harmonize" the two compulsory licenses absent the regulatory disparities discussed above, let's look at the most frequently mentioned common denominator for assessing royalties, a flat fee per subscriber. The goals of any change in Section 111 have to be revenue neutrality and simplicity. The flat fee obliterates the carefully crafted three-tier payment scheme of Section 111. This scheme was enacted in recognition of the differing burdens and obligations of smaller cable systems. Smaller systems are predominantly located in sparsely populated areas. They were made to pay lower fees so as to encourage their growth and development in rendering service to an underserved element of our population. An intentional byproduct of this policy is the aid which small cable systems provide to small market broadcasters. Congress took this communications policy into consideration in designing the three-tier rate schedule. The policy of promoting and protecting localism is just as valid today, if not more so since there is no way that DBS will ever be able to do what smaller cable systems do for their communities.

We would next like to address the proposal made by the most aggressive of the DBS operators, Rupert Murdoch, to amend the Copyright Act to permit satellite to home services to retransmit local television stations under their compulsory license and to be free of any royalty fee for such retransmission. His simplistic argument is that this "fix" would equalize the copyright treatment of local television station carriage for competing multichannel video programming providers. Unfortunately for Mr. Murdoch, as outlined above, this argument falls woefully short of addressing the complex relationship between copyright and communications policies. Mr. Murdoch seems to want the benefits of the compulsory license without shouldering the burdens of regulation. As Senator Ron Wyden stated this month in hearings on this very subject before the Senate Commerce Committee, "...there are some who in effect would like to

cherry pick the crown jewels of the communication sector without exercising some of the responsibility."

In this context, let us examine the issue of the carriage of local signals as it relates to the compulsory license. Preston Padden, president of Mr. Murdoch's satellite division and one of his principal spokesmen, had the following to say in 1986, when he was the president of the Association of Independent Television stations, in a speech given in Los Angeles:

Under the copyright and communications policy scheme enacted a decade ago, the list of stations that a cable operator was permitted to take for free was precisely co-extensive with the list of stations it was required to carry on a non-discriminatory basis under the "must-carry" rules. This was not an accident; nor was it a coincidence. Rather, it reflected the equity and fairness that were the hallmarks of what Congress called its "delicate balance."

We couldn't agree more. Cable systems do indeed have a no-fee compulsory license for local signals. However, a cable system must provide subscribers every single television station which is licensed to the Area of Dominant Influence in which the system is located and every educational station within 50 miles. This can amount to one-third or more of a cable system's channel capacity. Is Mr. Padden's boss, Mr. Murdoch, proposing to do the same? No, and his proposed satellite system, which is literally not yet off the ground, will not have the ability to do so. Mr. Murdoch makes the grand gesture of stating that he, too, will devote one-third of his channel capacity to local signals. However, for cable television that one-third of channel capacity in every community means that about 98% of all television stations are carried. In the case of DBS, one-third of a national satellite will mean somewhere between 70-80% of all television stations will not be carried. The purpose of must-carry rules is to protect local broadcasters. Cable's carriage obligations do that. The Murdoch plan for DBS decidedly does not. Mr. Murdoch is proposing to carry some, but not all, of the stations in each market, and even this proposal covers only the larger markets.

Further, each station carried by Mr. Murdoch will be on an encrypted nationwide footprint. No matter what assurances you may hear about the security of the technology, piracy will be a major problem in no time. Indeed, Mr. Murdoch admitted before the Senate Commerce Committee that the "smart card" technology which he will employ can easily be defeated. Imagine a world where the New York City network stations are received (illegally) by satellite customers in Fargo where, because of the small size of the market and the limited channel capacity on the satellite, none of the local stations are even on the satellite. Sports fans will be unable to resist the siren call of a smart card "fix" that will allow them to watch virtually all sporting events from every major market all the time for no extra fee. The Copyright Office would do well to remember why it is that Congress granted cable systems a compulsory license for the carriage of local signals and why no fee was imposed. As noted above, the legislative history vividly recounts that the compulsory license was enacted in the context of an existing set of FCC "must-carry" regulations. No per signal fee was imposed because the required carriage of all local signals allowed Congress to conclude that such carriage caused no harm to any local stations or to the copyright owners. Additionally, carriage of those signals did not pose any threat to market integrity. The same cannot be said for the proposed retransmission of some local signals by the satellite program providers.

The Copyright Office should therefore not put itself in the position of supporting a "harmonizing" proposal before the appropriate FCC and Congressional bodies have had an opportunity to address the "interplay" of copyright and communications policy issues. As things stand now, enactment of Mr. Murdoch's proposal would not level the playing field, it would instead tilt the playing field further in his direction and seriously threaten copyright interests. As Senator John McCain, the Chairman of the Senate Commerce Committee, said recently, "I

don't know how you can consider this copyright issue on a stand-alone basis, because it's all part of a much larger scenario of issues."

Respectfully submitted,

CABLE TELECOMMUNICATIONS ASSOCIATION

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Dated: April 28, 1997

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Comment Letter

DM 97-1

No. 22

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April 28, 1997

Nanette Petruzzelli, Esq.
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Re: Comments in Docket No. 97-1

Dear Ms. Petruzzelli:

On behalf of my clients, the National Basketball Association and the National Hockey League, I am enclosing an original and 14 copies of Comments in Docket No. 97-1.

Should you have any questions, please communicate directly with the undersigned.

Thanking you in advance, I am

Sincerely,

Philip R. Hochberg
Philip R. Hochberg

enc.

03963.0012; 03961.0012

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In fact, there is a third alternative: Do not create a new compulsory license or extend any existing compulsory license that would require copyright owners to subsidize these new forms of communication. Passage of the Copyright Revision Act in 1976 and the Satellite Home Viewer Act of 1988, which created the existing compulsory licenses, was done solely to assist the incipient cable and satellite industries whose distribution could be limited to the United States and whose existence was threatened by a lack of access to programming and financial resources. Their passage was based on concerns that marketplace licensing mechanisms for these industries would not promote the purposes of the Copyright Act. Those circumstances do not exist with Open Video Systems or the Internet.

In dealing with Open Video Systems ("OVS"), the Leagues have already stated their opposition to the Office's extending the cable compulsory license to OVS.^{3/} The NBA and NHL believe that not only is such an extension of the existing license unwarranted, but also that entities the size of the telephone companies are perfectly capable of entering marketplace negotiations without the benefit of any compulsory license.

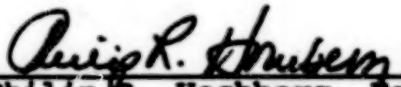
3/ See Comments in Copyright Office Docket No. 96-2, filed July 3, 1996, by the Office of the Commissioner of Baseball, National Basketball Association, National Hockey League and National Collegiate Athletic Association.

With respect to the Internet, its vast international potential -- and the inability to confine retransmissions domestically -- combined with its ability to store, edit, and retransmit information, makes extension of either of the existing licenses or the creation of a new compulsory license highly inappropriate and harmful to the ability of copyright owners to license their programming outside of the United States.

Finally, with respect to other new technologies and future forms of communication, the Leagues believe that Congress should make a separate determination of whether a compulsory license is necessary, not simply issue a "blanket" compulsory license.

For the reasons stated above, the National Basketball Association and the National Hockey League urge that no action be taken dealing with compulsory licenses for Open Video Systems or the Internet.

Respectfully submitted,


Philip R. Hochberg, Esq.
Counsel
NATIONAL BASKETBALL ASSOCIATION
NATIONAL HOCKEY LEAGUE

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April 28, 1997

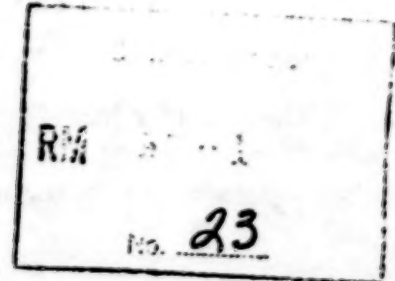
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Nanette Petruzzelli, Esq.
Acting General Counsel
Copyright Office
James Madison Memorial Building
Room LM-403
First and Independence Avenue, SE
Washington, DC 20540



Re: Revision Of The Cable And Satellite Carrier Compulsory Licenses
Docket No. 97-1

Dear Ms. Petruzzelli:

Please find enclosed for filing in the above-referenced proceeding an original and fifteen copies of the Written Statement of Time Warner Inc.

If there are any questions regarding this matter, please communicate directly with the undersigned.

Sincerely,

Seth A. Davidson

Enclosures

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Before the
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GENERAL COUNSEL
OF COPYRIGHT

APR 28 1997

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Revision of the Cable and Satellite
Carrier Compulsory Licenses

) Docket No. 97-1
)

RM 87-1
No. 23

WRITTEN STATEMENT OF TIME WARNER INC.

Time Warner Inc. ("Time Warner"), by its attorneys, hereby submits the following written statement in response to the Copyright Office's "Notice of Public Notice and Request for Comments" ("Notice") regarding the cable and satellite carrier compulsory licenses. 62 Fed. Reg. 13396 (March 20, 1997). Time Warner is a diversified media company with a number of interests that have a direct stake in the issues raised by the Office's notice. These interests include:

- **Time Warner Cable** — a multiple system operator of cable systems nationwide, which is engaged in the extensive retransmission of broadcast signals, both local and distant, and which is one of the largest contributors to the cable compulsory license copyright royalty pool.
- **Warner Bros.** — which is engaged in the production and distribution of theatrical films, television programs and home videos and which is a significant copyright royalty pool claimant.

- **The WB Network** — an emerging television broadcast network which is currently heavily dependent upon the distribution of its programming through the secondary transmission of distant broadcast stations to supplement coverage obtained by over-the-air WB Network affiliates.
- **Superstation WTBS** — the most widely distributed television broadcast superstation.
- Numerous nonbroadcast satellite-delivered programming networks including premium services such as HBO and Cinemax and advertising-supported "basic" networks such as CNN, TNT and Cartoon Network.
- **Primestar** — Time Warner affiliates hold a minority investment in Primestar, a DBS provider which is subject to Section 119 of the Copyright Act.

Time Warner believes that its diverse interests, both as creator and distributor of video programming, give it a uniquely balanced perspective on the issues raised by the Office's inquiry regarding the retransmission of broadcast programming by multichannel video distributors.

The Office's inquiry poses over 50 separate questions relating to the cable and satellite carrier compulsory licenses. The following comments do not attempt to address each of these questions individually. However, consistent with the structure of the Office's notice, Time Warner has organized its statement into three sections: basic principles; the cable compulsory license; and the satellite carrier compulsory license. Moreover, a single, central thesis informs Time Warner's comments: namely, the cable and satellite carrier compulsory licenses are both products of carefully-crafted legislative compromises designed to balance telecommunications as well as copyright policy concerns. Consequently, no

substantive modifications in either compulsory license scheme should be undertaken unless Congress is able to forge new copyright and telecommunications policy compromises in order to achieve a result that accounts for the interests of copyright owners and copyright users and advances the interests of the viewing public.

I. BASIC PRINCIPLES.

The Office's notice raises a number of basic questions regarding the use of compulsory licensing to clear the rights to retransmit broadcast television programming. These questions address such fundamental issues as whether compulsory licensing is still justified and whether the existing licenses should be repealed or phased out. If broadcast retransmissions remain subject to compulsory licensing, should the existing licenses for cable and satellite carriers be combined into a single provision or otherwise be harmonized? And should compulsory licensing be extended to encompass additional means of retransmitting broadcast signals?

In response, Time Warner wishes to emphasize at the outset its strong conviction that the constitutional objective of encouraging the creative arts is best promoted by the give and take of the marketplace free of government intrusion. Time Warner also wishes to acknowledge that, as is obvious to even casual observers, the economic, technological, and regulatory environment in which the broadcast programming industry operates has changed dramatically over the past twenty years and continues to change, as demonstrated most dramatically by the FCC's recent adoption of digital television rules -- rules that promise to transform the broadcast industry over the next several years.

Despite our preference for the free exercise of intellectual property rights and our recognition of the fact that the broadcast programming industry not only has changed dramatically over the past twenty years, but continues to change at an ever-quickenning pace, it is Time Warner's considered opinion, based on our experience as copyright owners and copyright users, that compulsory licensing continues to be an efficient mechanism for multichannel video programming distributors to clear the rights to retransmit broadcast television programming.

First, it is an undeniable fact of life that the influence of government regulation pervades the broadcast programming industry. From the system of broadcast station allotments which determine the level of over-the-air service available from community to community, to the FCC's rules establishing the territorial boundaries of a broadcaster's exclusive distribution rights, to the various rules governing the retransmission of broadcast signals, including must carry (which mandates the retransmission by cable operators of local broadcast signals), must buy (which directs the inclusion of all local and nonsuperstation distant broadcast stations on a cable operator's "basic" tier of service), and syndicated exclusivity, network nonduplication and sports blackout (which require the blackout of certain distant broadcast retransmissions), government is omnipresent in the broadcast industry. Consequently, suggestions that compulsory licensing distorts an otherwise unfettered marketplace are based on a fiction. Indeed, the imposition of mandatory carriage requirements renders the no-fee cable compulsory license for local station retransmissions a virtual necessity, while the retransmission of distant stations, particularly regional distant

stations, is a direct outgrowth of allocation policies that limited the number of local broadcast stations available in medium and smaller markets.

Second, the ultimate objective underlying the constitutional mandate directing Congress to promote the development of the creative arts is the furtherance of the public's interest in the widespread dissemination of intellectual property. Compulsory licensing has proven to be an efficient and effective mechanism for achieving this objective. As the Copyright Office itself concluded in its 1992 report to Congress, compulsory licensing not only assures the public's access to broadcast programming (by reducing the administrative costs of clearing the voluminous rights to all of the programs on all broadcast stations) but also encourages further creativity and diversity in programming (by compensating copyright owners for the retransmission of their works).

Time Warner will leave the detailed recitation of statistical information to others. Suffice it for us to point out that, twenty years after the enactment of the Section 111 cable compulsory license and nearly a decade after the enactment of the Section 119 satellite carrier compulsory license, the number of outlets for video programming, both broadcast and nonbroadcast, has expanded dramatically, giving the American public access to creative works of unparalleled diversity and quality. Under the circumstances, Time Warner is loathe to advocate radical revisions in the current compulsory licensing approach without clear and convincing evidence that such revisions will not create dislocations or have unintended consequences that could harm copyright owners, copyright users, and the public.

Assuming that retransmission of broadcast programming continues to be subject to compulsory licensing, the Office has asked whether the cable and satellite carrier licenses

should be combined into a single license and whether the license should extend to additional distribution facilities, including "open video systems" ("OVS") and the internet. These questions raise fundamental issues of regulatory parity and the interplay between copyright and telecommunications policy. Different distribution formats currently have widely varying regulatory obligations. For example, in order to protect broadcast exclusivity arrangements, the FCC has imposed network non-duplication and syndicated exclusivity obligations on cable television systems. These same rules do not apply to satellite carriers, including DBS. Instead, the impact of satellite carrier retransmissions on broadcast exclusivity are partially addressed in the Copyright Act by the imposition of "white area" limitations and the establishment of different rates for "syndex-proof" and "non-syndex proof" superstations. Even more significantly, while cable systems are subject to the interplay between retransmission consent and must carry obligations, only retransmission consent applies to satellite carriers. Furthermore, differences in the rules relating to the retransmission of broadcast signals constitute only one facet of the numerous regulatory distinctions between cable systems and satellite carriers. Unless and until all of these regulatory differences are reconciled, no single compulsory license scheme can fairly be applied both to cable and to satellite carriers.

Second, for many of the same reasons that Time Warner believes that satellite carriers and cable systems should continue to have separate compulsory licenses, Time Warner also believes that the terms and conditions under which other distribution technologies are licensed to retransmit broadcast programming may have to be tailored to meet the particular regulatory and technological characteristics of those services. For example, Time Warner

submits that, in the case of the internet, which has not yet evolved into a "multichannel" video distribution facility and which is essentially unregulated, the establishment of any compulsory license scheme would be premature. In contrast, compulsory licensing is appropriate for OVS, MMDS, and SMATVs, but on terms that account for any technological and regulatory peculiarities of those services.

In this regard, Time Warner wishes to express its concern regarding one element of the Office's recent decision regarding the applicability of the Section 111 cable compulsory license to SMATVs. As we understand the Office's ruling, a satellite carrier that provides service to MDU customers, either directly or through a bulk arrangement with the MDU's management, will be considered a SMATV operator subject to the Section 111 cable compulsory license rather than the Section 119 satellite carrier compulsory license. Among the anomalies created by this decision is the fact that a satellite carrier which serves an MDU will be subject neither to the network nonduplication rules (because the satellite carrier/SMATV is not a cable system under the FCC's rules) nor to the "white area" provisions of Section 119 (since the satellite carrier/SMATV is governed by Section 111, not Section 119). Time Warner can see no reason why the Section 119 satellite carrier compulsory license should not apply where a satellite carrier is providing service to an MDU.

Finally, before turning to specific proposals for reforming the cable and satellite carrier compulsory licenses, Time Warner wishes to briefly address the issue of whether "fair market value" should be the standard for compensation under either Section 111 or Section 119. As discussed above, Time Warner is a strong supporter of the free marketplace

as it relates to compensation for intellectual property rights. However, the fact is that, in the context of a compulsory license, there is no such thing as a rate based on "fair market value." In a marketplace unencumbered by compulsory licensing, the price paid for programming varies widely depending on a variety of factors; as a result, the same purchaser is likely to pay different prices for different programs and different purchasers are likely to pay different prices for the same program. In the compulsory license context, any licensing scheme that attempted to produce rates that emulated the rigors of the marketplace would either be unacceptably complex or arbitrarily simple. Rather than pursue the unattainable goal of "fair market value" compulsory license rates, the better objective is to pursue compulsory license rates that provide "fair value." Time Warner believes that the current compulsory license rate structures, including provisions which allow for occasional adjustments in those rate structures, provide "fair value."

II. CABLE COMPULSORY LICENSE.

The Office's Notice raises a number of questions relating specifically to the Section 111 cable compulsory license. A few of these questions address issues that have been discussed in the previous section, such as whether the cable compulsory license should be repealed or phased out and, if not, whether it is appropriate to treat new distribution formats such as OVS and the internet as cable systems for purposes of the Section 111 compulsory license. In addition, the Office has posed several questions which relate to proposals to "simplify" the cable compulsory license by replacing the current gross receipts-based royalty calculation with a "flat fee" approach similar to the Section 119 satellite carrier compulsory license. The Office also seeks comments on whether there should be regulatory or economic

caps on the number of distant signals that can be carried pursuant to the cable compulsory license and whether the Section 111 cable compulsory license should be amended to address issues raised by the consolidation and clustering of systems through mergers and acquisitions.

To briefly reiterate, Time Warner believes that the Section 111 cable compulsory license is a public policy success and should be retained. As the Office itself concluded in its 1992 report to Congress, the cable compulsory license has "functioned well," achieving its legislative purposes. Moreover, Time Warner believes that any proposals to create a "unified" compulsory license applicable to all multichannel video programming distributors must be considered in conjunction with broader legislative efforts to achieve regulatory parity among such distributors, both in terms of copyright policy and telecommunications policy.

Keeping these principles in mind, Time Warner is not opposed to efforts to simplify or streamline the cable compulsory license. However, any such efforts must be "revenue neutral" and must produce a result that provides true simplification. Quite frankly, Time Warner has doubts whether a "flat fee" approach can achieve these goals.

First, both in 1990 and in 1995, copyright owners and the cable industry agreed not to seek any quintennial adjustments (as provided for in the Copyright Act) in the cable compulsory license royalty rate structure. In light of these agreements, any simplification proposal (such as the adoption of a flat fee approach) must be "revenue neutral" (i.e., neither raising nor lowering the total royalty pool collected under the current gross receipts-based scheme for the same levels of broadcast retransmissions). Further, even under a "revenue neutral" approach, some accommodation must be made to prevent substantial increases in the

royalty rates paid by small cable operators -- increases that would undoubtedly be borne ultimately by consumers.

Second, any revision in the current gross receipts-based royalty calculation must truly be simple. While Section 111 was the source of considerable confusion and controversy in years past, it currently functions quite smoothly. As indicated above, the past two rate adjustment proceedings were settled without any change in the rates. (And, apart from the syndex-surcharge proceeding in 1990, there have been no contested rate adjustment proceedings involving the cable compulsory license since 1985.) In addition, the Satellite Home Viewer Act of 1994 contained an amendment to the Section 111 cable compulsory license redefining the local service area of a broadcast station in terms of the station's ADI, thereby reconciling the cable compulsory license with the must carry requirements of the Communications Act and addressing one of the principal sources of confusion identified in the Copyright Office's 1992 report to Congress.

Under the circumstances, Time Warner is understandably concerned that a major revision of the Section 111 cable compulsory license, no matter how carefully crafted and well-intentioned, could actually be more disruptive than beneficial. In expressing this concern, Time Warner draws on its knowledge of past efforts to simplify the cable compulsory license. For example, in 1992, legislation was introduced (H.R. 4511 and S. 3342) that would have created a "flat fee" compulsory license. Among the issues raised by that legislation, and never resolved, was how to build into the flat fee structure a surrogate for the 3.75 percent rate for additional "non-permitted" distant signal carriage without completely undermining the objective of simplifying the royalty calculation.

Admittedly, there continue to be a few areas of confusion in the implementation of the cable compulsory license, most notably the issue of "phantom signals" and the treatment of contiguous systems as a single system for purposes of Section 111. However, it is not necessary to adopt a flat fee approach to address the "phantom signals" problem. The Office has a longstanding proceeding regarding this issue in which both copyright owners and the cable industry have proposed a solution to the phantom signal problem under the current law by allowing royalty calculations to be made on a "subscriber group" basis. Moreover, even if the Office concludes that such an approach is not authorized under Section 111 as presently written, a narrow amendment permitting such subscriber group calculations is all that is needed, not a complete overhaul of the cable compulsory license.

III. SATELLITE CARRIER COMPULSORY LICENSE.

As noted earlier, Time Warner not only is a copyright owner and a cable operator, but also a broadcast network operator, a superstation owner, and a partner in a DBS venture. Consequently, Time Warner has a direct interest in issues relating to the Section 119 satellite carrier compulsory license. These issues, as identified by the Copyright Office, include (i) whether the scheduled sunset of Section 119 on December 31, 1999 should be extended and (ii) whether Section 119 should be amended to address issues that have arisen with respect to the scope of the "white area" restriction, as applied both to satellite retransmission of distant network affiliates and to satellite retransmissions of local broadcast stations.

With regard to the scheduled sunset of Section 119 on December 31, 1999, Time Warner does not oppose a permanent extension of the license. As discussed, Time Warner believes compulsory licensing of broadcast retransmissions continues to be a necessary and

appropriate means of ensuring that the public's access to broadcast programming is not disrupted and that copyright owners are fairly compensated for the retransmission of their works. Furthermore, over nearly a decade's time, expectations that the negotiation/arbitration process in Section 119 would produce an alternative to compulsory licensing have proven to be unfounded. Under the circumstances, requiring periodic renewal of Section 119 will simply produce a regular game of legislative "chicken" which will unduly burden both the industries affected by the license and Congress. The onus should be on those who would change the status quo by eliminating the license, not on those who would maintain it.

While Time Warner is not opposed to a permanent extension of Section 119, we are concerned that any substantive modifications to the terms of the satellite carrier compulsory license could upset the careful balance of copyright and telecommunications policy issues embodied in the current provision. Any change in the substantive terms of Section 119 -- particularly the terms of the "white area" restriction -- requires the forging of a consensus among all of the affected interests.

Consistent with this position, Time Warner is supportive of efforts by the satellite industry and the broadcast networks to negotiate a settlement of their disputes regarding the application and enforcement of the white area restriction. Such a settlement could render the need for legislative action on the white area issue unnecessary. Or, in the alternative, it could provide the basis for legislative action designed to ensure that consumers residing in areas where it can be agreed that local signals are truly unavailable over the air are able to

obtain network programming in a manner that does not threaten local network affiliate relationships.

Similarly, so as to maintain the balance originally struck in the enactment of Section 119, Time Warner urges the Copyright Office to adhere to its past practice of strictly construing the compulsory license provisions of the Act. In particular, the Office should conclude that under Section 119(a)(2)(B), which provides that retransmissions of broadcast network signals are eligible for the satellite carrier compulsory license only where the recipient of the retransmission is an "unserved household" (a household unable to receive a signal of an affiliate of the same network), satellite carriers may not retransmit a network signal to a household located in the network signal's local service area (nor may the carrier deliver a station into another station's Grade B contour where that contour overlaps the local service area of the station being retransmitted). If satellite carriers wish to engage in the retransmission of network stations within their local markets -- a practice not contemplated when Section 119 was originally adopted -- an amendment to Section 119 is necessary.

Furthermore, the retransmission of local signals by satellite carriers raises issues of telecommunications policy as well as copyright policy. In particular, in the 1992 Cable Act, Congress linked the concept of a no-fee compulsory license for the retransmission of local signals to the mandatory carriage of such signals by creating an exemption to the must carry rules for "local" (in FCC terms) stations that would be deemed distant signals for copyright purposes (and whose carriage would trigger the payment of distant signal royalties). The Office should make clear that satellite carriers should be entitled to a no-fee compulsory license for local signals retransmissions only if they also are subject to must carry

obligations. (Similarly, Time Warner submits that the Copyright Act should be amended to make clear that MMDS operators, who have historically relied on antennas installed at the subscriber residence for local signal reception, should have a no-fee license for local retransmissions only if they are subject to mandatory local signal carriage obligations.)

In addition, the transformation of DBS from a national service to a localized service raises a number of competitive parity issues regarding the extent to which DBS should be subject to (or other multichannel distributors relieved of) syndicated exclusivity, network nonduplication, and sports blackout regulation, "must buy" requirements; "anti-buy through" requirements (*i.e.*, restrictions on the forced sale of an intermediate tier of service as a condition of purchase of premium services); local television station cross-ownership restrictions; and, PEG access obligations. These and other parity issues currently are being debated in Congress and at the FCC. And while certain of these issues may go beyond the Office's expertise, the Office should make clear in its report to Congress that all of the copyright and telecommunications policy issues raised by the satellite retransmission of local broadcast signals should be resolved on a comprehensive, rather than piecemeal, basis.

Finally, there are technological issues relating to the satellite retransmission of local broadcast signals that present unique copyright challenges. Although the technological means by which satellite carriers intend to retransmit broadcast signals to their local markets has frequently been described as involving the use of "spot beams," the fact is that the local signals will be retransmitted on a nationwide basis (or, at best, on a regional basis covering multiple television markets). In order to restrict reception to the local market, satellite carriers will utilize a "smart card" encryption technology. If this encryption technology is

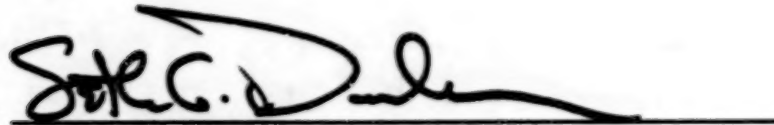
defeated, broadcast signals will be viewable not only in their local markets, but in other markets as well, in contravention of purpose of the Section 119 white area provision. Consequently, it is imperative that the Office's recommendations to Congress address the need for the inclusion in the Copyright Act of provisions that provide satellite carriers with incentives to protect the security of their "local" retransmissions and that create remedies for any breach of that security.

IV. CONCLUSION.

The Office's inquiry regarding the compulsory licensing of retransmissions of broadcast signals comes in the midst of a crucial public policy debate concerning issues of competitive and regulatory parity in the rapidly changing video marketplace. The retransmission of broadcast signals and the copyright issues relating thereto are critically important; yet, they are only one element of the debate. Time Warner believes that compulsory licensing of broadcast retransmission remains appropriate and necessary. Time Warner also believes that the Section 111 compulsory license is working well and, consequently, we are skeptical of efforts to reform or "simplify" Section 111. Similarly, apart from extending the sunset of Section 119, Time Warner believes that any substantive modification in the satellite carrier license, including attempts to "harmonize" Section 119 with Section 111 in whole or in part, should only be considered in the context of the larger debate on regulatory and competitive parity.

Respectfully submitted,

TIME WARNER INC.

A handwritten signature in dark ink, appearing to read "Seth A. Davidson", written over a horizontal line.

Aaron I. Fleischman

Seth A. Davidson

Fleischman and Walsh, L.L.P.
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202/939-7900

Its Attorneys

Dated: April 28, 1997

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In the Matter of)

Revision of the Cable and)
Satellite Carrier)
Compulsory License)

Docket No. 97-1

Comment Letter

RM 97-1

No. 24

COMMENTS OF THE RECORDING INDUSTRY
ASSOCIATION OF AMERICA

The Recording Industry Association of America, Inc. ("RIAA") submits the following comments in response to the Copyright Office's "Notice of Public Meetings and Request for Comments" published at 62 Fed. Reg. 13396 (Mar. 20, 1997) ("Notice").

INTRODUCTION

The RIAA is a trade organization whose members create, manufacture and distribute more than 90% of all sound recordings produced and sold in the United States. Through this submission, RIAA comments only on the issue of whether compulsory licensing should be extended to new means of digital retransmission of over-the-air broadcasts, such as Internet retransmissions of over-the-air radio broadcasts. See Notice § B.3 at 13,399.

RIAA does not comment on the other more general issues concerning cable and satellite carrier compulsory licensing described in the Notice.

RIAA believes that an appropriate balance among the various interests affected by Internet and other digital retransmissions of broadcasts of sound recordings already has been struck by the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA"). The DPRA created a right to perform sound recordings publicly "by means of a digital audio transmission," see 17 U.S.C. § 106(6), and made that right subject to certain limitations, including statutory licensing in the limited circumstances where that extraordinary step was thought to be warranted. The provisions of the DPRA and the policy underlying its enactment reflect Congress' intent not to subject most current Internet retransmissions of broadcasts of sound recordings to compulsory licensing.

There is currently no evidence that would justify adopting a compulsory license for Internet retransmissions of sound recordings, and numerous policy arguments counsel against one. The Copyright Office has correctly concluded in the past that "[i]n our free enterprise, marketplace system, a government mandated compulsory taking of property rights is a last resort." Register of Copyrights, Report on the Cable and

Satellite Carrier Compulsory Licenses: An Overview and Analysis, xii (Mar. 1992) [hereinafter "Compulsory License Report"]. Here, there is no evidence that marketplace licensing mechanisms are inadequate or that other concerns that have traditionally given rise to compulsory licensing are present.

In addition, the marketplace for Internet and other digital transmissions is unsettled and evolving. Imposition of a compulsory license would skew its development by favoring certain transmission services over others, and might impair the growth of the industry as a whole. The marketplace should be given the opportunity to function on the Internet, and voluntary licensing of Internet retransmissions of broadcast transmissions of sound recordings is the appropriate mechanism for doing so. RIAA is open to exploring mechanisms, such as blanket licensing, to facilitate voluntary licensing of sound recordings for such Internet retransmissions.

DISCUSSION

- I. Under the DPRA, Sound Recording Copyright Owners have Exclusive Rights with Respect to Current Internet Retransmissions of Over-the-Air Broadcasts.

The DPRA added to the Copyright Act a new Section 106(6), which gives the owner of the copyright in a sound recording the exclusive right "to perform the

copyrighted work publicly by means of a digital audio transmission." This new right is subject to intricate provisions that limit its application to certain transmissions and retransmissions. See 17 U.S.C. § 114(d)-(j).

It is clear that the retransmission of a radio broadcast of a sound recording over the Internet or a similar medium constitutes a public performance by means of a digital audio transmission. See 17 U.S.C. § 101, 114(j)(3) (defining public performance and "digital audio transmission").¹ Accordingly, an Internet retransmission of a radio broadcast of a sound recording is subject to the digital performance right of the sound recording copyright owner unless exempt under section 114(d)(1) of the Copyright Act.

Section 114(d)(1) sets forth numerous exemptions for transmissions and retransmissions that are not part of an interactive service. Section 114(d)(1)(B) is an exemption for certain retransmissions of broadcast

¹ The Senate Report in the DPRA specifically confirms that Congress understood the Internet to be a digital transmission mechanism. S. Rep. No. 128, 104th Cong., 1st Sess. 36 (1995) [hereinafter S. Rep. No. 128] ("a digital transmission, whether delivered by cable, wire, satellite or terrestrial microwave, video dialtone, the Internet or any other digital transmission mechanism, could be a subscription transmission if the requirements cited above [in the definition of the term 'subscription transmission'] are satisfied." (Emphasis added)).

transmissions.² It exempts "a retransmission of a radio station's broadcast transmission" only in limited circumstances. Significantly, with respect to retransmissions on the Internet, the exemption does not apply if the broadcast transmission is "willfully or repeatedly retransmitted more than a radius of 150 miles from the site of the radio broadcast transmitter."
§ 114(d)(1)(B)(i).

It is not clear how one could structure a service to deliver retransmissions of broadcasts using the Internet while adhering to the 150 mile limit. The Internet is a global communications medium. Therefore, retransmissions regularly would be made to users located more than 150 miles from the site of the broadcast transmitter. Thus, the exemption of Section 114(d)(1)(B) cannot apply.

The DPRA also provides a narrow statutory license for certain subscription transmissions that meet the requirements found in section 114(d)(2). However, because most Internet retransmissions of broadcasts

² The other exemptions in section 114(d)(1) do not apply to Internet retransmissions: subparagraph (A)(i) does not apply to retransmissions, subparagraph (A)(ii) does not apply because the original radio broadcast transmission is intended for reception by the general public, and subparagraph (A)(iii) does not apply because Internet transmissions are not "broadcast" transmissions. The other exemptions in subparagraphs (B)(ii)-(iv) and (C) address specific circumstances not relevant to Internet retransmissions in general.

being made today are provided on a nonsubscription basis, they would not qualify for the DPRA's statutory license. Thus, Internet retransmissions of broadcast transmissions of sound recordings currently being made are subject to the exclusive rights of the sound recording copyright owner.

It follows that the Copyright Office's analysis of a possible compulsory license authorizing Internet or other digital retransmissions of broadcast transmissions must necessarily include consideration of the sound recording copyright owner's rights under the DPRA. RIAA submits that the DPRA and the current marketplace make any such compulsory license both unnecessary and unwarranted.

II. The Purpose and Policy of the DPRA Would Be Thwarted by a Compulsory License for Internet Retransmissions.

There is no need for Congress to revisit the issue of compulsory licensing for Internet retransmissions of broadcasts of sound recordings. Only two years ago, Congress established in the DPRA an appropriate balance among the interests affected by these retransmissions. See S. Rep. No. 128 at 15-16 (The DPRA was intended "to strike a balance among all of the interests affected" by the grant of a new digital performance right.). Indeed, Congress considered and addressed certain concerns that otherwise might favor a

compulsory license by enacting limitations on the digital performance right, including a statutory licensing mechanism. See, e.g., S. Rep. No. 128 at 16 (The limitations on the new performance right address the concern that a new right "would make it economically infeasible for some transmitters to continue certain uses of sound recordings."). Congress did not extend these limitations to nonsubscription Internet retransmissions of broadcasts, however, concluding instead that sound recording copyright owners should have the right to control such retransmissions.

The DPRA was enacted to correct a long-standing anomaly in copyright law: the absence of a performance right for sound recordings. See S. Rep. No. 128 at 13. Congress also intended to preserve the incentives for recording artists and producers to create new sound recordings by ensuring appropriate copyright protection in the digital age. See S. Rep. No. 128 at 14 ("[I]n the absence of appropriate copyright protection in the digital environment, the creation of new sound recordings and musical works could be discouraged"). Accordingly, the Act gives sound recording copyright owners the exclusive right to perform sound recordings publicly by means of digital audio transmissions. 17 U.S.C. § 106(6). While this right was made subject to certain limitations, those

limitations were intended to "grandfather" certain existing transmission services such as traditional over-the-air radio broadcasts. As the Senate report on the DPRA states:

[T]he Committee has sought to address the concerns of record producers and performers regarding the effects that new digital technology and distribution systems might have on their core business without upsetting the longstanding business and contractual relationships among record producers and performers, music composers and publishers and broadcasters that have served all of these industries well for decades.

S. Rep. No. 128 at 13.

The exemptions for retransmissions of a radio station's broadcast transmission found in the DPRA are limited in that the retransmissions must be made within 150 miles of the radio station's transmitter or within the "local communities" of the retransmitter. 17 U.S.C. § 114(d)(1)(B)(i) & (ii). In deciding to exempt traditional radio broadcasts and certain retransmissions, Congress was motivated by the fact that broadcasters "provide a mix of entertainment and non-entertainment programming and other public interest activities to local communities to fulfill a condition of the broadcasters' license." *Id.* at 15 (emphasis added). These exemptions were not intended to permit all forms of retransmission. Rather, they were intended

both to protect broadcasters from retransmissions by superstations into their local markets and to protect sound recording copyright owners from widespread retransmission by superstations. Allowing retransmissions beyond these geographic limits would alter the fundamental nature of the compromise solution achieved by Congress in the DPRA.

The narrow statutory license granted to certain subscription transmissions, 17 U.S.C § 114(d)(2), has five specific requirements which limit its application to digital audio transmission services similar to those in existence at the time the DPRA was enacted. Thus, the limitations on the applicability of this statutory licensing mechanism, like the exemptions for certain retransmissions, reflect Congress' desire to provide sound recording copyright owners exclusive rights with respect to digital transmissions unless absolutely necessary to do otherwise to preserve existing uses.³

³ Congress granted this license to subscription transmissions, and not to nonsubscription transmissions, in part to grandfather existing subscription services and future similar services. In addition, revenues from subscription transmissions provide a base for determining statutory royalties that more accurately reflect the fair market value of the sound recordings and that can be calculated more readily. Finally, subscription transmissions -- which, by definition, must be "controlled and limited to particular recipients" -- can be tracked and accounted for better than transmissions offered on a nonsubscription, uncontrolled basis.

Any extension of compulsory licensing to Internet retransmissions of broadcasts of sound recordings would upset the balance Congress struck to accommodate certain existing uses of copyrighted sound recordings with adequate copyright protection for sound recordings in the digital environment. Moreover, it would undermine Congress' primary intention to ensure adequate copyright protection for sound recordings in the digital age by eroding the limited digital performance right granted to sound recording copyright owners only two years ago.

III. Compulsory Licenses are a "Last Resort" that Should Only Be Enacted to Serve Compelling Interests Which Are Not Present Here.

Congress' intent in the DPRA to leave Internet retransmission licensing to the marketplace is consistent with the general principles of the Copyright Act. The Copyright Office said it best when it concluded that "[i]n our free enterprise, marketplace system, a government mandated compulsory taking of property rights is a last resort." Compulsory License Report at xii. Compulsory licenses are the rare exception to copyright protection, and should not be imposed unless absolutely necessary to serve a compelling interest.

The United States consistently opposes compulsory license regimes proposed by developing countries because they would weaken copyright protection for U.S. works,

and thus, the incentives to create new works. As the Commissioner of Patents and Trademarks has said,

[W]e cannot justify adding new compulsory licenses to our law while the United States continues in its efforts to rid the rest of the world of unjustified compulsory licensing systems, which force U.S. copyright owners to accept statutory license fees rather than fees set in the marketplace for the use of their works abroad.

Digital Performance Right in Sound Recordings Act of 1995: Hearings on H.R. 1506 Before the Subcomm. on Courts and Intellectual Property of the House Committee on the Judiciary, 104th Cong., 1st Sess. 157 (statement of Bruce A. Lehman) [hereinafter "House DPRA Hearings"]

Indeed, in the debate over the DPRA, the Copyright Office repeated its call for a comprehensive public performance right for sound recordings, not limited by a compulsory license, to protect sound recordings in new digital media, noting that "with the growth of the Internet, . . . , there is an urgency to enact this legislation." See House DPRA Hearings at 164-65 (statement of Marybeth Peters, Register of Copyrights) (also saying that "I wish the [DPRA] were broader and that all digital transmissions of public performances were covered."). In the same hearings, the Commissioner of Patents and Trademarks specifically advised that the digital performance right should not be limited by a compulsory license. House DPRA Hearings at

162 (statement of Bruce Lehman, Commissioner of Patents and Trademarks) ("The Administration believes that licensing of this right should be left to the marketplace and sees no reason to create a new compulsory license."). In short, the policies underlying U.S. copyright law and the DPRA simply do not support the inclusion of Internet retransmissions of sound recordings in a new compulsory license system.

IV. The Current Marketplace does not Require a Compulsory License for Digital Retransmissions and Likely Would be Harmed by Such a License.

The current evolving and uncertain state of digital transmission services also militates against imposition of a compulsory license. No one yet knows the size of this potential market nor the means of transmission and programming that will be most desirable to consumers. These uncertainties should be resolved by free market forces, not by a compulsory licensing system that abrogates market forces. As the Administration's National Information Infrastructure Task Force recognized:

Compulsory licensing disregards marketplace forces. Such licensing schemes treat all works alike, even though their value in a competitive marketplace would likely vary dramatically. It also treats all users alike. It alters the free market relationship between buyer and seller.

Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights 52 (Sept. 1995) [hereinafter "NII White Paper"]. The NII White Paper concludes that "[t]he marketplace should be allowed to develop whatever legal licensing systems may be appropriate for the [digital environment]." Id. at 153.

Imposition of a compulsory license in favor of Internet retransmitters of radio broadcasts would create inefficiencies in the development of the digital transmission services market. In an analogous circumstance, the FCC has recommended that the cable compulsory license be abolished because it creates inefficiency in the market for television programming. See In re Compulsory Copyright License for Cable Retransmission, 4 F.C.C. 6562, 6563 ¶ 8 (Aug. 1989) ("Our analysis suggests that American viewers would reap significant benefits from elimination of the compulsory license The compulsory license impedes [the] flow [of information about viewer preferences] to the detriment of the public interest in diverse and popular programming."). A similar result could occur with digital transmission services. For example, Internet transmission services that originate programming with the authorization of the copyright owner would pay

market royalty rates while retransmitters of over-the-air broadcasts would enjoy the compulsory rate. This is likely to stifle the development of Internet transmission services that originate their programming and thus limit consumers' choice of digital transmission services.

V. Any Concerns that Might be Addressed by Compulsory Licensing Should First Be Addressed by Voluntary Licensing Systems.

The current infancy of the digital transmission marketplace does not indicate that voluntary licensing will burden retransmission services' efforts to obtain copyright clearances. To help prevent such conditions from arising, RIAA is open to exploring mechanisms to facilitate the voluntary licensing of sound recordings. We believe that it ought to be possible to devise licensing mechanisms, such as blanket licensing, that would address the concerns that traditionally have justified a compulsory license without establishing arbitrary royalty rates that are contrary to marketplace realities.

CONCLUSION

The RIAA opposes any extension of compulsory licensing of digital retransmissions of broadcasts of sound recordings. Congress has only recently established copyright protection for digital performances of sound recordings. In doing so, Congress

recognized that in new digital media like the Internet, sound recording copyright owners should have exclusive rights with respect to nonsubscription retransmissions of broadcasts of their works. Only two years after enactment of the DPRA, it would be unwise to revisit this considered judgment. In any event, the marketplace for digital retransmissions does not require a compulsory license system. Instead, it would be preferable to rely upon voluntary licensing mechanisms that better reflect marketplace realities.

Respectfully submitted,

RECORDING INDUSTRY ASSOCIATION
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April 28, 1997



GENERAL COUNSEL
OF COPYRIGHT

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April 28, 1997



William Roberts
Senior Attorney
Copyright Office
Office of the General Counsel
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Dear Mr. Roberts:

Re: USTA's Testimony in Docket No. 97-1

The United States Telephone Association ("USTA") hereby files an original and fifteen (15) copies of its written testimony regarding compulsory licensing and related issues in the above-referenced proceeding.

Respectfully submitted,

Keith Townsend
Director, Regulatory Affairs & Counsel

cc: Roy Neel
Mary McDermott

cc: [illegible]

In the Matter of:

The Copyright Office's Notice of Public Meetings and Request for
Comments Regarding the Revision of the Cable and Satellite
Carrier Compulsory Licenses (Docket No. 97-1)

Comments Before the Copyright Office of the
United States Telephone Association (USTA)

INTRODUCTION

The United States Telephone Association ("USTA") submits these comments in response to the Copyright Office's Request for Comments published on March 20, 1997 (62 FR 13396) regarding the revision of the cable and satellite carrier compulsory licenses, 17 U.S.C. §§ 111 and 119, respectively (hereafter "Section 111" and "Section 119").

USTA is the principal trade association for the incumbent local exchange carrier industry. In addition, USTA members currently provide video programming through such outlets as open video systems, wireless, and wireline cable systems. Moreover, the Telecommunications Act of 1996 envisions that incumbent local exchange carriers ("ILECs") would utilize multiple options to

provide video programming competition.¹ Thus, access by ILECs to programming on an equal basis with other providers of video programming services is critically important to the ability of ILECs to successfully compete in this market.

These comments address the necessity of maintaining cable and satellite carrier compulsory licenses found in Section 111 and Section 119; the application of such licenses to new and existing technologies, including OVS platforms; and, the application of the "passive carrier" exemption found at Section 111(a)(3) to new and existing networks and platforms.

As discussed in more detail below, USTA believes:

- 1) The cable compulsory license is necessary and should not be eliminated and, the compulsory license for "satellite carriers" should be made permanent;
- 2) The "passive carrier" exemption found in Section 111(a)(3) must be maintained and applied to carriers or distributors deploying cable systems, OVS platforms, wireless, satellite and all other delivery systems, where the carrier/distributor provides equipment and services but does not control the selection of the content or information delivered over such system;
- 3) OVS platforms are "cable systems" for purposes of Section 111, and are entitled to the benefits of the compulsory license for the retransmission of local and distant broadcast signals under the existing "plain language" of 17 U.S.C. § 111; any changes to the cable or satellite compulsory licenses should not change the entitlement and application of the license to OVS platforms;

¹ 47 U.S.C. § 571.

4) The rules and rates of the compulsory licenses, even if amended, must be applied fairly and evenhandedly to all delivery platforms vis-a-vis the rules and rates applied to all existing (or new) technologies and systems (traditional cable, OVS, satellite, wireless, etc.); and,

5) Any restructuring of the cable and satellite licenses should result in a compulsory licensing scheme that is regulatory and technology neutral,² and which fairly and equitably applies to cable, satellite, wireless and all new technologies. This will promote open and fair competition among the various delivery systems.

1. NECESSITY OF COMPULSORY LICENSES

The cable compulsory license found at Section 111 is necessary and should not be eliminated. If eliminated, it would make it impossible for distributors, especially smaller distributors and new entrants in the marketplace, to obtain the necessary rights to carry broadcast signals over traditional or new "cable systems" and to compete with incumbent cable systems.

In fact, the license should be broadened to expressly include new technologies so the compulsory license is applied in a technology neutral manner.³ This will enable each new

² Throughout these comments reference is made to OVS as one of many program delivery systems for purposes of copyright law and the cable compulsory license. In fact, OVS is not a "new" technology at all, but simply a program delivery system established by law and regulatory overlay.

³ Indeed, the definition of a "cable system" is more inclusive than the Copyright Office has applied it. Under Section 111(f) the compulsory license applies to a "cable system," which is defined as "a facility, located in any State, Territory, trust Territory, or Possession, that . . . makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels . . ." 17 U.S.C. § 111(f). [Emphasis added]

technology to avoid the discriminatory and anticompetitive treatment that has in the past resulted in years of uncertainty about the application of the compulsory license (such as for MMDS and SMATV systems). In addition, a technology neutral application will result in the widest selection of programming and delivery systems, and increased competition to the benefit of consumers.

The compulsory license for "satellite carriers" found at Section 119, is equally necessary and should be made permanent. It should not be allowed to expire, as it would under current law, at the end of 1999, for the same reasons as it is necessary to maintain (and broaden) the cable compulsory license.

The justifications for the cable and satellite carrier licenses, first stated during the so-called "Copyright Revision" process (circa 1955-1976) are still valid. As the Register of Copyrights stated in 1965:

A particularly strong point on the CATV [community antenna television systems] side is the obvious difficulty, under present arrangements, of obtaining advance clearances for all of the copyrighted material contained in a broadcast. This represents a real problem that cannot be brushed under the rug, and it behooves the copyright owners to come forward with practical suggestions for solving it.⁴

⁴ "The Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill." (May 1965), p. 42.

In 1965, the Register acknowledged the issue was "one of the most hotly debated issues in the entire revision program."⁵ At issue was the question of whether the transmission by CATV systems of broadcasts embodying performances of copyrighted works constituted a "public performance" and therefore an infringement. From 1964 until the passage of the 1976 Act, Congress struggled with a way to address the differences between "common carriers" passively carrying copyrightable material and those actively carrying (by retransmission) broadcast signals.

In the interim, the Supreme Court interpreted the then existing Copyright Act of 1909 in two seminal cases (in 1968 and 1974) related to CATV, but both court decisions "urged the Congress...to consider and determine the scope and extent of such liability in the pending [1976] revision bill."⁶ The general concept first proposed in 1964 and adopted in 1976 was to provide a compulsory license for community antennae television owners.

As long as a CATV operator is authorized by his FCC license to carry a particular signal, he is entitled to rely on a 'compulsory license' with respect to the copyrighted material carried by the signal. In other words, if he registers his system with the Copyright Office and pays a

⁵ Supplementary Report of the Register, SUDRA, at 40. For a brief summary of the debate on the copyright issues involved in cable television during the Revision period of 1965 through 1975, see Draft Second Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1975 Revision Bill (October - December 1975), Chapter V ("Secondary Transmissions, Including Cable Television").

⁶ H.R. Rept. No. 94-1476, 94th Cong. 2d sess., p. 89 (1976). See Fortnightly Corp. v. United Artists Television, Inc., 382 U.S. 390 (1968), and Teleprompter Corp. v. CBS, Inc., 415 U.S. 394 (1974).

blanket fee based on a percentage of his gross, he is automatically licensed to carry copyrighted material as long as he complies with the FCC rules.⁷

Congress stated the purpose of the cable compulsory license very clearly in the House Report of the 1976 Revision Act:

In general, The Committee believes that cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material and that copyright royalties should be paid by cable operators to the creators of such programs. The Committee recognizes, however, that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system. Accordingly, the Committee has determined to maintain the basic principle of the Senate bill to establish a compulsory copyright license for the retransmission of those over-the-air broadcast signals that a cable system is authorized to carry pursuant to the rules and regulations of the FCC.⁸ [Emphasis added]

That purpose -- to relieve the burden of obtaining individual consents -- still makes perfect sense today. In 1997, given the explosion of programming and new and existing delivery systems, it remains both impractical and unduly burdensome to require operators of systems including cable, OVS platforms, wireless, or satellite carriers to negotiate with every copyright

⁷ Supplementary Report of the Register, supra, at 27. "An even briefer way to summarize the provisions is this: a cable system does not have to worry about copyright liability for a particular program if all the signals he is carrying comply with the FCC regulations and he pays a set fee into the Copyright Office every three months." [Note: this was eventually changed to a semi-annual system]. Id. at 28.

⁸ H.R. Rept. No. 94-1476, 94th Cong., 2d Sess., p. 89. See also Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) and National Cable Television Association, Inc. v. Copyright Royalty Tribunal, 724 F.2d 176, 179 (D.C. Cir. 1983) ("individual marketplace negotiations...would entail inordinately high transactional costs.").

owner whose work is transmitted via that delivery system. In addition, copyright owners have had over 20 years to devise a substitute scheme. None has evolved or even been proposed. For this reason, neither the cable nor the satellite compulsory license should be eliminated. Rather, the licenses should be simplified to ease their administration. Such an overhaul will benefit system operators, copyright owners receiving royalties, the Copyright Office overseeing the licensing system and, ultimately, consumers.

2. **NECESSITY OF THE PASSIVE CARRIER EXEMPTION**
(17 U.S.C. § 111(a)(3))

During Copyright Revision, a narrow exemption from liability (and from the compulsory license) was adopted. This provision applies to "passive carriers" of secondary transmissions, that is, carriers that simultaneously retransmit the signals of television stations without controlling or altering the content or the particular recipients of the signals.

Specifically, Section 111(a)(3) provides that a telephone or other company is a passive carrier for the secondary transmission of a primary transmission embodying a performance or display if it has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and its activities with

respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others.'

It is essential for Congress and the Copyright Office to maintain the "passive carrier" exemption found in Section 111(a)(3), for carriers, including cable systems, OVS platforms, wireless, satellite and any other delivery systems, where the carrier or distributor provides equipment and services but does not control the selection of the content or information delivered

' There are similar provisions for satellite carriers in the Satellite Home Viewer Act of 1994, Pub.L. 103-369. See also 17 U.S.C. § 111(a)(1) (secondary transmissions of broadcast signals by hotels, apartment houses and similar establishments to private lodgings); 17 U.S.C. § 111(a)(2) (secondary transmissions of certain instructional broadcasts).

Section 111(a)(3) reads:

The secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of copyright if--

(3) the secondary transmission is made by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others: Provided, That the provisions of this clause extend only to the activities of said carrier with respect to secondary transmissions and do not exempt from liability the activities of others with respect to their own primary or secondary transmissions.

Also defined in 17 U.S.C. § 111(f) for the purposes of Section 111 are "primary transmission" and "secondary transmission."

over the system, nor the recipients of such content or information. Further, the definition in Section 111(a)(3), specifically "wires, cables or other communications channels," should be clarified to apply to all such delivery systems, platforms and technologies delivering broadcast signals.

The passive carrier exemption was initially incorporated into the Copyright Act with the participation and at the insistence of the telephone companies (acting as "common carriers") to maintain their immunity from copyright liability for the carriage on their equipment of copyrightable materials.¹⁰ The maintenance of the "passive carrier" exemption for carriers, including telephone companies, for example, on

¹⁰ Letter of Professor Walter J. Derenberg on behalf of American Telephone and Telegraph Company, April 25, 1967, to Thomas C. Brennan, Chief Counsel, Committee on the Judiciary, U.S. Senate, following the introduction of S. 597, (1967), reprinted in Hearings Before the Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary, United States Senate, 90th Cong. 1st Sess., Pursuant to S. Res. 37 on S. 597, April 28, 1967, Part 4 Appendix, p. 1143.

See also Copyright Roundtable Discussion of 1964 Revision Bill, statement of Abe Goldman, Copyright Office staff regarding the phrase "common carrier" in the 1964 bill ("What we had in mind was somebody like A.T. & T., a coaxial cable, or a microwave relay. We did not have CATV in mind as a 'common carrier.' It is not our intention to exempt CATV. May I just say that we also intended that clause (C), which talks about communicating 'a performance or exhibition of the work to the public by means of any device or process,' would cover wire communications.").

See also Hearings Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary, 100th Cong., 1st and 2d Sess. 22 (1988) (statement of Rep. Carlos Moorhead on H.R. 2848, Satellite Home Viewer Act) (When Congress enacted the Copyright Act of 1976 it granted the passive carrier exemption "to passive carriers like telephone companies").

their OVS platforms, is essential to avoid liability for any otherwise infringing activity. This includes their activities related to any must-carry signals, public, educational and governmental channels that OVS are required to carry, as well as programming delivered by unaffiliated video program providers offering video services to subscribers.

Those few court decisions on point regarding "passive carrier" exemptions extend the reach of the exemption for cable and OVS operators as retransmitters of broadcast signals in certain specific, but important ways.¹¹ The decisions allow a cable or OVS operator to rely on the passive carrier exemption when leasing its channel capacity to others in certain circumstances, including:

1. allowing its wires, cables and equipment that comprise the cable system or OVS, to be used by others to simultaneously retransmit primary transmissions of FCC broadcast signals;
2. choosing which broadcasts to retransmit so long as there is no alteration, deletion or addition to the signals;
3. carrying the signals of broadcasters even if the broadcasters change the advertising on the carried signal, e.g., over-the-air signals and simultaneous transmission by microwave with different advertisements on each, provided both signals are simultaneously available and, so long as the additions, deletions or alterations to the programming are made by the primary broadcaster and not the cable or OVS operator; and

¹¹ See Eastern Microwave Inc. v. Doubleday Sports, Inc., 691 F.2d 125 (2d Cir. 1982), cert. denied, 459 U.S. 1226 (1983) and Hubbard Broadcasting, Inc. v. Southern Satellite Sys., Inc., 777 F.2d 393 (8th Cir. 1985) cert. denied, 479 U.S. 1005 (1986).

4. providing ancillary promotional support.

The existing statutory language should be clarified to permit a telephone company or other carrier that leases its system of wires, cables, or other communications channels to a programmer, where such telephone company or other carrier technically selects which homes to serve (because the wires and channels are capable of serving such homes), to retain the passive carrier exemption. This is because such carrier is not exercising direct or indirect control over the particular recipients of the secondary transmissions but merely is exercising its discretion based on technological limitations, a permissible activity well within the parameters of the Eastern Microwave exemption.¹² Moreover, a telephone company's provision of services such as marketing, or billing its customers, where the company markets, bills, or collects fees from particular recipients of secondary transmissions on behalf of other "cable systems" (or OVS programmers other than the telephone company), does not involve the exercise of direct or indirect control. Thus, a telephone company should not lose its status as a "passive carrier" by virtue of providing such services.

¹² Clearly, the passive carrier exemption continues to apply when telephone companies act as common carriers in the provision of wires, cables and other communications channels for the delivery of telephony, video and data services.

3. APPLICATION OF CABLE COMPULSORY LICENSE
TO OPEN VIDEO SYSTEMS

In Docket No. 96-2, the Copyright Office sought comments to determine whether an OVS can be treated as a "cable system" within the statutory definition of Section 111, thereby entitling an OVS to use the cable compulsory license for the retransmission of certain broadcast signals on the OVS platform. Many of the commenters in that proceeding provided extensive documentation on the meaning of Section 111 analyzing the statutory language and legislative history, clearly demonstrating that under current law an OVS is a "cable system" within the meaning of Section 111.¹³

As constructed by Congress, OVS platforms are intended to enable programmers to sell multichannel video programming services to subscribers, and such services are to include the retransmission of broadcast programming in competition with cable incumbents. The operator of any system that provides services and engages in activities meeting the statutory definition of a "cable system" is entitled to the cable compulsory license for the retransmission of certain broadcast signals on an OVS platform. Without the cable compulsory license, OVS operators and/or third party programmers on an OVS platform, would have to

¹³ See Comments of the United States Telephone Association, US West Inc., and Joint Comments Before the Copyright Office of Bell Atlantic, BellSouth, NYNEX, Pacific Telesis Group and SBC Communications, In the Matter of: The Copyright Office's Notice of Inquiry Regarding the Eligibility of Open Video Systems for the Cable Compulsory License (Docket No. 96-2), and, see Reply Comments.

obtain copyright licenses not only from broadcast stations, but from every owner of every program and commercial carried by such broadcast stations. This would place a competitive burden on OVS operators not borne by cable operators or any other multichannel video provider.

Congress created OVS in order to bring competition to a market dominated by incumbent cable operators. Congress stated that it hoped the OVS approach would "encourage common carriers to deploy open video systems and introduce vigorous competition," also noting that OVS operators "will be 'new' entrants in established markets and deserve lighter regulatory burdens to level the playing field."¹⁴ The availability of the cable compulsory license for OVS operators is an essential and viable means of fair competition with these incumbent cable operators.

As detailed in many of the comments filed last year in Docket No. 96-2, the legislative history (including the purpose and text of the statute) of the Copyright Act of 1976, as well as the judicial determinations since that time, confirm the position that OVS platforms should be treated as cable systems in this context.¹⁵ In addition, in adopting the Telecommunications Act

¹⁴ The Telecommunications Act, Pub. L. No. 104-104, § 653(c)(4), 110 Stat. 56 (1996), H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess., p. 178 (1996).

¹⁵ See Comments of the United States Telephone Association, US West Inc., and the Joint Comments of Bell Atlantic, BellSouth, NYNEX, Pacific Telesis Group and SBC Communications, supra note (continued...)

of 1996, Congress has provided the Copyright Office the opportunity and authority to treat an OVS as a "cable system" under the Copyright Act, having said:

[N]othing in this Act precludes a video programming provider making use of an open video system from being treated as an operator of a cable system for purposes of section 111 of title 17, United States Code.¹⁶

In the past, the Copyright Office expressed concern over its authority to apply the Section 111 license to new video delivery systems absent congressional action. No such doubt remains for OVS because this Telecommunications Act language gives the Office clear authority to act. Application of the compulsory license to "wired" systems known as OVS platforms is consistent with past congressional and Copyright Office policy concerns.¹⁷

In recent and past activity, Congress has clearly taken a technology neutral position on the application of the cable

¹⁵(...continued)

13, and see e.g., National Broadcasting Co., Inc. v. Satellite Broadcast Networks, Inc. 940 F.2d 1467 (11th Cir. 1991) ("Congress intended to paint with a broad brush" the definition of a cable system).

¹⁶ Id.

¹⁷ Multipoint Distribution Service, Notice of Proposed Rulemaking in Doc. No. 19493, 34 F.C.C. 2d 719 (1972); See also 47 CFR 21.903 (1986) (FCC Rules on purposes of permissible MDS service) and Instructional Television Fixed Service (MDS Reallocation), 54 R.R. 2d (P&F) 107, 110 (1983).

See 51 FR 36705 ("filings of notices and statements of account by SMATV and MMDS operators have been accepted by the Office for whatever value they may be held to have by a competent court").

compulsory license to OVS and other systems. The Copyright Office should adopt and endorse such an approach.

A. CURRENT STATUTORY COVERAGE OF THE COMPULSORY LICENSE FOR OVS PLATFORMS

The services and activities of an OVS platform fall squarely within the narrow definition of a "cable system." The definition of a "cable system" in Section 111(f) is:

[A] facility, located in any State, Territory, trust Territory, or Possession, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service. For purposes of determining the royalty fee under subsection (d)(1), two or more cable systems in contiguous communities under common ownership or control or operating from one headend shall be considered as one system.¹⁸ [Emphasis added]

As contemplated by Congress and the FCC, current law qualifies an OVS as a "cable system" within the plain meaning of the Act (including but not limited to Section 111(f)). OVS platforms are cable systems for copyright purposes composed of wires, located in a state, subject to must-carry rules, which retransmit broadcast signals to subscribers. The characterization of OVS as a cable system in this context is

¹⁸ This definition was amended in 1994 with the addition of the word "microwave" after "wires, cables."

further bolstered by the extensive legislative history detailed in many of the comments filed during last year's proceeding.¹⁹

Treating an OVS as a "cable system" in the copyright context is consistent with congressional intent, and the purpose and practice of the cable compulsory license (under copyright and communications law). In addition, sound public policy requires that OVS operators be entitled to take advantage of the cable compulsory license for the retransmission of certain broadcast signals. Allowing OVS platforms the cable compulsory license will enable these systems to operate on a level playing field with other existing video delivery systems (traditional cable and microwave systems) so they can provide competitive technology, services, and prices to consumers. Indeed, the Telecommunications Act of 1996 requires OVS operators to abide by must-carry and retransmission consent rules, which, without the advantage of the cable compulsory license, would subject OVS operators to substantial liability for copyright infringement. 47 CFR § 76.1500(a).

Even under the narrowest reading of the statute, the compulsory license applies to OVS platforms. Because of the

¹⁹ See Comments of the United States Telephone Association, US West Inc., and the Joint Comments of Bell Atlantic, BellSouth, NYNEX, Pacific Telesis Group and SBC Communications, *supra* note 13; see also in the same proceeding filed in Docket No. 96-2 Comments of UVTV; Comments of The Association of Local Television Stations, Inc.; and, Comments of Adelphia Communications Corporation.

similarities with traditional cable, programmers on an OVS platform will have little difficulty in complying with the provisos of this section. They will serve communities with licensed broadcast stations, and be able to determine, through reference to FCC rules, which signals they are permitted to carry. Moreover, to the extent that there are ambiguities, they will not be unique to OVS platforms, but will be similar to those faced by start-up "cable systems" that were not operating when the Commission's 1976 rules were in force.²⁰

The application of the compulsory license to an OVS would further the congressional purposes laid out in the legislative history -- providing certainty and fairness for the retransmission of a limited amount of copyrighted material, and encouraging competition between OVS platforms and other traditional cable services. Eligibility as a "cable system" will enable an OVS to submit a semi-annual Statement of Account with the Copyright Office to record gross receipts and the carriage of distant and local signals in accordance with the Copyright Act²¹ as these systems begin commercial service. Eligibility also will permit OVS to proceed in an orderly fashion in order to make the proper payments and conduct business under copyright law.

²⁰ Problems faced by systems include the determination of whether a distant signal is permitted to be carried, whether a signal is local to all communities served by a system, and how to handle systems that serve contiguous communities but carry different broadcast signals.

²¹ See 17 U.S.C. § 111(d) and 37 CFR 201.17.

Implementation of the compulsory license, and a determination of who must comply with the license, should be straightforward for systems comprised of multiple programmers. Any multichannel video programming distributor ("MVPD") that is retransmitting broadcast signals to subscribers should be eligible for (and liable under) the cable compulsory license. Therefore, if there are multiple programmers on a system, each such programmer should be liable for the payments under the compulsory license. To determine whether the filer at the Copyright Office for the "cable system" is the unaffiliated program provider and/or the telephone company (or another third party) would depend on which entity is selecting, receiving, amplifying and retransmitting the primary broadcast signals.²²

Finally, looking at the compulsory license scheme in general, it is clear that Congress intended to create an expansive rather than a limited definition of a "cable system." This is evidenced by the original legislative record as well as the subsequent remedial actions taken by Congress with respect to satellite master antenna television (SMATV) and multichannel multipoint distribution service (MMDS) systems. Legislative history also bears this out. In the Register of Copyrights' Draft Second Supplementary Report which accompanied the Revision

²² It is equally true that for these systems and in these instances, nothing should interfere with the important exception for passive carriers, in accordance with the statutory definition at Section 111(a)(3).

Bill, the Register summarized Section 111 of the 1975 bill (which eventually became law) as dealing with:

all kinds of "secondary transmissions." This usually means picking up a broadcast off the air and retransmitting it simultaneously by one means or another, usually cable.²³ [Emphasis added]

Testifying before the House subcommittee on the provisions of Section 111 in the Revision bill, Register of Copyrights Barbara Ringer said:

First, as to the scope of the provision: it deals with all kinds of secondary transmissions, which usually means picking up electrical energy signals, broadcast signals, off the air and retransmitting them simultaneously by one means or the other -- usually cable but sometimes other communications channels, like microwave and apparent laser beam transmissions that are on the drawing boards if not in actual operation.²⁴ [Emphasis added]

Notwithstanding this broad language, the Copyright Office took a narrow view of the treatment of other technologies under the cable compulsory license when it reviewed the applicability of the license to systems including SMATV; multipoint distribution service (MDS); MMDS; and satellite carriers.²⁵ But

²³ Second Supplementary Report, supra, at Chapter V, p. 26.

²⁴ Hearings on H.R. 2223 before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 94th Cong., 1st Sess., p. 1820 (1976).

²⁵ See 57 FR 3284 (January 29, 1992), Final Regulations on Cable Compulsory License; Definition of Cable System. The Copyright Office has followed the principle of "narrow interpretation of the compulsory license since inception of the Copyright Act of 1976" describing it as a "tenet of statutory construction" and citing the rules of statutory construction ("statutes granting exemptions from their general operation must be strictly construed, and, any doubt must be resolved against (continued...)

Congress signalled an intent different from that of the Copyright Office, evidenced by its reaction to the Office rulings on these systems and resulting in congressional expansion of the license to include other methods of video programming delivery. Such expansion should continue.

B. AN EVENHANDED APPLICATION OF COMPULSORY LICENSES IS NECESSARY FOR ALL DELIVERY SYSTEMS

The particular mechanics of royalty payments under the compulsory licenses by a service provider as administered by the Copyright Office should be consistent with one overarching policy. Namely, there must be an evenhanded application of the existing, amended or revised compulsory license to OVS platforms, cable, wireless, direct broadcast satellite and other systems.

²⁵(...continued)

the one asserting the exemption" 73 Am. Jur. 2d 313 (1991)).

See 51 FR 36705 (October 15, 1986), Copyright Office Notice of Inquiry, Definition of Cable Systems. See also Regulation of Receive-Only Domestic Earth Stations, First Report and Order in CC Doc. No. 78-374, 74 FCC 2d 205 (1979).

See 56 FR 31580 (July 11, 1991), Copyright Office Notice of Proposed Rulemaking, Cable Compulsory License; Definition of Cable System; see 51 FR 36705 (October 15, 1986) inviting public comment on the definition of the term "cable system" as it concerns the operation of the compulsory license in 17 U.S.C. § 111; see also 62 FR 18705 (April 17, 1997), Final Regulations on Cable Compulsory Licenses: Definition of Cable Systems (regarding eligibility of a SMATV system as a cable system).

The rules and rates of the compulsory licenses, even if amended, must be applied fairly and equivalently to all delivery platforms. The application of the compulsory license must be the same vis-a-vis the rules and rates applied to all existing (or new) technologies and systems (traditional cable, OVS platforms, satellite carriers, wireless, or other delivery systems).

The problems the Copyright Office now faces in applying the royalty rates to OVS platforms, for example, are no more difficult than those the Office now faces in light of the mergers and growth of existing cable systems. The cable compulsory royalty rates in place for existing cable and wireless systems are based on FCC rules and regulations that date back to 1976. There is no reason why these rules and regulations cannot equally and consistently be applied to OVS platforms. Moreover, the Copyright Office should not deprive OVS platforms, that fit squarely within the definition of a "cable system" in the Copyright Act, the benefits of the cable compulsory license just because there may be complications in applying the appropriate rates and forms. As described above, the rules and rates have been adapted for many technologies and systems since the inception of the compulsory license in 1976. OVS platforms meet the statutory purpose and definition and must also be so accommodated. Our comments and the comments of many others filed last year described the way in which to apply the rules to OVS platforms in a manner that is fair and equivalent to the rules as applied to traditional cable systems, MMDS and SMATV cable systems.

If, however, the Copyright Office determines that it is necessary to revise or amend the cable compulsory license, possibly merging Section 111 with the satellite license,²⁶ the resulting rules and rates can and should be evenly applied. The issue of signal carriage and royalty rates in the context of mergers and the growth of existing cable systems, also impact OVS platforms, and should be dealt with by the Copyright Office at the same time and in the same manner for all incumbent cable systems, OVS platforms, direct broadcast satellite systems, and for other multichannel video programming systems. In that regard, USTA supports the Congress and the Copyright Office taking a new look at restructuring the compulsory license to make it more equitable, easier to administer and neutral with respect to technologies and services.

4. RESTRUCTURING THE COMPULSORY LICENSES (CABLE, SATELLITE AND OTHER SYSTEMS)

Any restructuring of the cable and satellite licenses should result in a compulsory licensing scheme that is technology neutral. The compulsory license rules should be the same for cable, wired, satellite, wireless and all new technologies including consistent rules across all modes and methods of delivery. Decisions facing the Copyright Office today in the context of merged and growing systems, for example, that span multiple municipalities and communities, even state boundaries,

²⁶ 17 U.S.C. 119.

should be resolved by an evenhanded application to cable, OVS, direct broadcast satellite, SMATV and MDS/MMDS systems. It is time now for distinctions between and among competitors to end.²⁷

In sum, consideration of these rules, or new rules vis-a-vis incumbent cable, OVS platforms, wireless, satellite and other systems should result in a compulsory license that is: (1) (made) applicable to all these systems; and, (2) applied to them in an evenhanded manner.

We do not object to merging the cable compulsory license with the satellite compulsory license into a single technology neutral license, provided the royalty payments of the cable compulsory license, now based on gross receipts and distant signals, if converted to a per subscriber fee (like the Satellite Home Viewer Act), do not result in increases in the fees paid to copyright owners. Further, and equally important, any new compulsory license must retain a mechanism that will accommodate the possibility of carriage of local broadcast signals on every type of delivery system.

²⁷ We take no position at this time on the "white area" dispute surrounding the importation of distant network signals by direct broadcast satellite distributors. We do note, however, that the rules governing permitted signals and the associated fees, must be the same regardless of the mode or method of delivery to subscribers.

The policy of applying the compulsory license(s) to every delivery system must be consistent and fair. The harmonization of the (new) compulsory license, whether as two licenses (one for systems such as cable that are "local" in nature, the other for national satellite carriers), or as one single license applicable to all modes of delivery, must be completed in a manner that provides fair and equal treatment for all competitors in the video marketplace.

Moreover, any new copyright scheme should be easier to administer than the very cumbersome system presently in effect. The current Section 111 system -- especially the mechanism for computing royalties and making Copyright Office filings -- is burdensome. The rules are tied to arcane and outdated FCC regulations, do not take into account the current state of the industry, and are difficult for the Copyright Office to administer and for copyright owners to enforce. A per subscriber fee would be one means, but not the only means, of simplifying and clarifying existing rules and implementing new ones. In addition, resolution of outstanding Copyright Office dockets (including but not limited to, the questions of mergers and the growth of existing cable systems), is also important to the administration of the licenses.

CONCLUSION

In conclusion, we believe that: the cable compulsory license is necessary and should not be eliminated, and that the compulsory license for "satellite carriers" should be made permanent; the "passive carrier" exemption found in Section 111(a)(3) must be maintained and applied to carriers or distributors deploying cable systems, OVS platforms, wireless, satellite and all other delivery systems; and OVS platforms are "cable systems" for purposes of Section 111, and are entitled to the benefits of the compulsory license for the retransmission of local and distant broadcast signals under the plain language of 17 U.S.C. § 111. Furthermore, any restructuring of the cable and direct broadcast satellite licenses should result in a compulsory licensing scheme that is technology neutral, and which fairly and evenhandedly applies to cable, satellite, wireless and all new technologies. These changes and improvements will result in a system that is easier to administer, that is open and fair to all technologies, and which provides consumers with the greatest number of programming choices and competitive delivery systems.

Respectfully submitted,

UNITED STATES TELEPHONE ASSOCIATION
(USTA)

A handwritten signature in dark ink, appearing to read 'Roy Neel', written over a horizontal line.

Roy Neel
President and CEO
United States Telephone Association
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April 28, 1997

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BY MESSENGER

Office of the General Counsel
Copyright Office
James Madison Building, Room LM-403
First and Independence Avenue, S.E.
Washington, D.C. 20540

Common Letter

RM 97-1

No. 26

RE: *Docket No. 97-1 (Revising the Cable and Satellite Carrier Compulsory Licenses)*

Dear Ms. Petruzzelli:

Pursuant to the notice of the above proceeding published in the Federal Register for March 20, 1997 (62 Fed. Reg. 13396) and revised April 16, 1997 (62 Fed. Reg. 18655), there are hereby submitted 15 copies of the written statement of Ritchie T. Thomas on behalf of The National Collegiate Athletic Association for the hearings scheduled to begin on May 6, 1997.

Please call if you have any questions.

Sincerely yours,



Ritchie T. Thomas

Squire, Sanders & Dempsey L.L.P.
Counsel for
The National Collegiate Athletic Association

RTT/cs
Enclosures

Boston . . . Brussels . . . Budapest . . . Cleveland . . . Columbus . . . Jacksonville . . . Kyoto . . . London
. . . Miami . . . Moscow . . . New York . . . Phoenix . . . Prague

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GENERAL COUNSEL
OF COPYRIGHT

APR 28 1997

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In the Matter of)

Revision of the Cable and)
Satellite Carrier)
Compulsory Licenses)

Docket No. 97-1

Comment Letter

RM 97-1

No. 26

**STATEMENT OF RITCHIE T. THOMAS ON BEHALF OF
THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION**

This statement is submitted on behalf of The National Collegiate Athletic Association ("NCAA"), in response to the Copyright Office's Notice of Public Meetings and Request for Comments, published at 62 Fed. Reg. 13396 (March 20, 1997) ("Notice"). The Notice seeks comments on issues raised in connection with possible legislative reexamination of the cable television system and satellite carrier compulsory licenses in sections 111 and 119 of the Copyright Act (17 U.S.C. §§ 111 and 119).

The NCAA is a voluntary, unincorporated association of 902 colleges and universities, and allied and affiliated conferences and institutions. The NCAA and its members conduct numerous intercollegiate athletic events each year, many of which are the subject of television broadcasts, which in turn may be retransmitted by cable television systems or satellite carriers. The NCAA, on its own behalf and on behalf of its members, has participated in each of the royalty distribution and rate adjustment proceedings conducted under the compulsory license provisions of sections 111 and 119, generally on a joint basis with Major League Baseball, the National Basketball Association, and the National Hockey League.

The NCAA subscribes to the basic positions expressed by the contemporaneously filed comments of the Office of the Commissioner of Baseball. This statement supplements those comments in order to emphasize three points.

1. The present compulsory license systems for cable television and satellite carrier retransmissions should not be expanded to new categories of retransmissions. In particular, compulsory licenses should not be extended to retransmissions of television broadcast signals via the Internet or by telephone companies over open video systems. There are no unmanageable transaction costs or other barriers to prevent telephone companies or other entrepreneurs wishing to use these technologies to retransmit television broadcasts from dealing with copyright owners in the marketplace for the required rights. A compulsory license system for these technologies, on the other hand, would be particularly inequitable with respect to the NCAA and its members, because it not only would deny them marketplace returns for the use of their events, but also would further break down regional college sports broadcast arrangements. In view of the Internet's worldwide scope, a compulsory license for Internet retransmissions would even allow others to displace the sponsoring institutions in the exploitation of international markets for college sports event telecasts. The compulsory license systems have shown themselves incapable of addressing and compensating damage of this kind.

2. Indeed, the existing cable television and satellite carrier compulsory copyright licenses should be eliminated. In the more than 20 years since the cable compulsory license system was enacted, the cable television industry has changed enormously. There no longer can be any question of prohibitive structural barriers to the satisfactory operation of a market-based system of retransmission authorization for either cable systems or satellite carriers. And there

is no reason why college and university athletic programs should be required to continue to subsidize the media giants that now dominate the cable television industry.

3. If, nevertheless, statutory compulsory licenses for cable systems, satellite carriers, or both, are retained, they must be extensively reformed. The present systems do not adequately compensate copyright owners; they are unnecessarily complex; and they involve large administrative costs that are preponderantly and unfairly borne by copyright owners. A properly structured "tariffing" system of the kind suggested by the Commissioner of Baseball would mitigate these problems and should be adopted. If, however, the present structure were to be retained, it would be essential: to simplify cable system royalty rates; to make rates for both cable and satellite as nearly market-based as possible; to distribute system administrative costs more equitably (*e.g.*, by requiring cable systems and satellite carriers not only to pay market-based rates, but also to pay an annual "user" fee that in the aggregate would equal one-half of the Copyright Office's budgeted costs of administering the compulsory license systems and one-half of typical distribution panel costs); and to expedite, simplify, and standardize distribution and rate adjustment proceedings.

Respectfully submitted,

THE NATIONAL COLLEGIATE ATHLETIC
ASSOCIATION

By: 

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April 28, 1997



GENERAL COUNSEL
OF COPYRIGHT

APR 28 1997

RECEIVED

Marvin L. Berenson
Senior Vice President
General Counsel

April 28, 1997

BY HAND

Nanette Petruzzelli, Esq.
Acting General Counsel
Office of the General Counsel
Copyright Office
James Madison Memorial Building
Room LM-403
First and Independence Avenue, SE
Washington, DC 20540

Re: Docket No. 97-1

Dear Ms. Petruzzelli:

In accordance with the Copyright Office notices of March 17, 1997 (62 Fed. Reg. 13396) and April 11, 1997 (62 Fed. Reg. 18655), enclosed are fifteen (15) copies of my written statement regarding in the matter of revision of the cable and satellite carrier compulsory licenses.

Sincerely,

Marvin L. Berenson

Enclosure

MLB:mh

APR 24 1997

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..... X
In the Matter of: :
: Docket No. 97-1
REVISION OF THE CABLE AND :
SATELLITE CARRIER COMPULSORY :
LICENSES :
..... X

Comment Letter
RM 97-1
No. 27

STATEMENT OF MARVIN L. BERENSON
ON BEHALF OF BROADCAST MUSIC, INC.

My name is Marvin L. Berenson. I am Senior Vice President and General Counsel of BROADCAST MUSIC, INC. (BMI).

My written statement is submitted on behalf of BMI, a music performing rights licensing organization incorporated in New York, which licenses the public performing right in approximately 3 million musical works, including works by BMI's 180,000 affiliated songwriters, composers and publishers, as well as tens of thousands of foreign works that are licensed in the United States through BMI's agreements with over 55 foreign performing rights organizations.

On March 17, 1997, the Copyright Office (Office) issued a Notice of Public Meetings and Request for Comments in this proceeding to address certain issues concerning possible revisions to the cable and satellite carrier compulsory licenses. See 62 Fed. Reg. 13396 (1997) (Notice). The Notice asks many questions concerning the complex legal and economic issues presented by these compulsory licenses. Given the short amount of time available for preparation of my statement,

it has not been possible to address all of the Office's questions, which in several cases are highly technical and would appear to require a significant amount of applied research to answer. Rather, I will focus my remarks on three broad points: (1) whether there is justification for continuing the compulsory licenses; (2) if so, whether and how the compulsory licenses should be "harmonized"; and (3) the applicability of the compulsory licenses to new media such as open video systems and the Internet. BMI reserves its right to address in its reply comments other questions that the Notice presents, after reviewing the comments of other parties on these matters.

I. DESCRIPTION OF BMI.

BMI licenses the public performing right in the approximately three million musical works that are owned by its affiliated songwriters, composers and music publishers to users of music in the fields of broadcast and cable television and radio, concerts, restaurants, stores, background music services, colleges and universities, passenger vessels, trade shows, corporations, skating rinks and a large variety of other venues.

BMI has played an important role in the development of the U.S. copyright law, in particular the 1976 Copyright Act (Act) as well as the recently enacted Digital Performance Rights in Sound Recording Act and legislation concerning the National Information Infrastructure that was introduced last year in Congress. BMI's President, Frances W. Preston, served on the United States Advisory Council on the National

Information Infrastructure which reported its findings to President Clinton in January of 1996. See A NATION OF OPPORTUNITY: REALIZING THE PROMISE OF THE INFORMATION SUPERHIGHWAY (January 1996). During the 104th Congress, I was an active member of the 17-person committee appointed by Congressman Carlos Moorhead and guided by Congressman Robert Goodlatte to attempt to negotiate a resolution to the issue of on-line service provider liability.

Furthermore, BMI has been very active in the international arena. Frances Preston is on the Executive Bureau as well as the Administrative Council of the International Confederation of Authors and Composers Societies (CISAC). I am a member of the CISAC Legal and Legislative Committee and I recently served as a member of the U.S. delegation to the World Intellectual Property Organization's (WIPO) Conference on Certain Copyright and Neighboring Rights Questions, which adopted two treaties: the WIPO Copyright Treaty (which supplements the Berne Convention) and the WIPO Performances and Phonograms Treaty. These treaties, which were adopted on December 20, 1996, and await ratification by the countries that are signatory to the Berne Union, address the applicability of Berne to new technology.

Moreover, BMI was an active participant in the process that brought the United States into the Berne Union in 1988, and BMI (along with its sister performing rights organizations in the United States, ASCAP and SESAC), actively negotiated a marketplace solution for the compulsory license for coin-operated phonorecord players ("jukeboxes"), eliminating the need for government intervention.

BMI, ASCAP and SESAC have participated in every Copyright Royalty Tribunal (CRT) and Copyright Arbitration Royalty Panel (CARP) proceeding under the section 111 and section 119 compulsory licenses for cable and satellite retransmission of broadcast signals, respectively. This includes our participation as the "Music Claimants" in Phase I royalty distribution proceedings, where a portion of the overall royalties are distributed among different categories of programming, as well as in Phase II proceedings involving disputes within the Music Category.

The Music Claimants have received approximately 4.5% of the total funds distributed each year, and have in turn paid out these sums, amounting to many millions of dollars, to songwriters and composers and publishers whose works have been performed on retransmitted signals.

BMI, ASCAP and SESAC, have also actively participated in each rate adjustment proceeding under the statutes since their inception, and have commented in numerous rulemaking proceedings conducted by the Office throughout the years on issues of interpretation and application of the licenses. The Music Claimants are currently parties to the ongoing CARP proceeding to adjust the satellite carrier compulsory rates for the period from July 1997 through the sunset of the compulsory license on December 31, 1999. The issues addressed by the Notice are not only of importance to BMI's affiliated songwriters, composers and music publishers, but fall well within BMI's more than fifty years of experience in licensing the public performing right to users of music.

II. THE CABLE AND SATELLITE CARRIER COMPULSORY LICENSES SHOULD CEASE TO EXIST ON DECEMBER 31, 1999.

A. The Rationale for the Cable Compulsory License Is Gone.

BMI shares the consensus view of the broader copyright owner community that the original reasons for the cable compulsory license -- enacted in the Copyright Revision Act of 1976 (effective January 1, 1978) -- have disappeared. Accordingly, BMI believes that section 111 should be repealed. The current section 119 compulsory license for satellite carriers is scheduled to sunset in December 31, 1999, and given the desire for a competitive playing field between the vying interests in the television industry, it would make sense to sunset the cable compulsory license on that date as well.

The original rationale for the section 111 cable compulsory license was that cable was an infant industry that needed protection from the free market. Section 111 was included in the Copyright Act of 1976 in response to two Supreme Court decisions in *Fortnightly* and *Teleprompter*, which had held that cable retransmission of broadcast signals did not constitute copyright infringement under the 1909 Copyright Act. See *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), *reh'g denied*, 393 U.S. 902 (1968); *Columbia Broadcasting Sys., Inc. v. Teleprompter Corp.*, 476 F.2d 338, 349 (2d Cir. 1973), *rev'd in part*, 407-415 U.S. 394 (1974).

In a word, the infant has now matured into an adult. With maturity comes independence, and cable is no longer in need of the compulsory license. Cable

systems are more than capable of negotiating free market licenses for the performing rights in copyrighted programming on retransmitted broadcast television and radio signals.

B. Cable Is Now a Media Giant.

The most significant development since the enactment of section 111 in 1976 is the astounding growth in the size and importance of the cable television industry. In its most recent annual assessment of the status of competition in the market for multichannel video programming delivery, the Federal Communications Commission (FCC) reported that both the number of systems with large channel capacity and the number of subscribers continued to increase in 1995, the most recent full year for which such statistics are available. Third Annual Report, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 96-133 (January 2, 1997) (Report), at ¶¶ 16-17. Overall, the number of homes passed by cable systems increased to 92.7 million at the end of 1995, which means that cable television was available to 96.7% of all television households. *Id.* at ¶ 13. Total subscribership (referred to in the industry as cable penetration) was 62.1 million households, for a penetration level of 67% of homes passed. *Id.* at ¶ 14. Industry analysts project that subscriber growth will continue over the next decade. *Id.*

The FCC further reported that the cable industry's total revenue (including subscriber, advertising and installation payments) grew by 10.8% in 1995 to \$25.1 billion. *Id.* at ¶ 22. This approaches the total revenue of the broadcast television

industry in 1995 of \$27.9 billion, as reported by the Television Bureau of Advertising. Steve McClellan, *Broadcasting Up 3%*, BROADCASTING & CABLE, March 4, 1996, at 27.

In its report, the FCC also states that programming rights fees paid by cable operators to basic cable programming services increased 19% compared with the previous year to \$2.658 billion in 1995. Report at ¶ 19. Rights fees paid for so-called premium pay networks increased to \$1.94 billion in 1995. *Id.* These rights fees compare to the total in 1995 of \$164 million of copyright royalties contributed by cable operators under section 111 of the Copyright Act for all broadcast signals (both distant and local). *Id.* See also Library of Congress, Copyright Office, *Licensing Division Report of Receipts*, Oct. 18, 1996.

Quite clearly the cable industry has developed into a giant in the television industry. The Supreme Court acknowledged this in its landmark ruling upholding the "must carry" rules enacted by Congress in the Cable Consumer Protection and Competition Act of 1992 (virtually all of the significant provisions of which have now been upheld in the federal courts from cable industry challenges). See *Turner Broadcasting Sys., Inc., et al. v. Federal Communications Comm'n*, 65 U.S.L.W. 4209 (March 31, 1997). The Court observed that "[a]s to the evidence before Congress, there was specific support for its conclusion that cable operators had considerable and growing market power over local video programming markets." *Id.* at 4214.

As part of this industry growth, cable systems now have substantial experience in negotiating program rights with basic and pay cable programming services. Moreover, in the wake of enactment of the 1992 Cable Act, cable systems have

developed substantial experience in negotiating with broadcast stations, too, for retransmission consent rights. With regard to music performing rights in particular, BMI recently concluded a precedent setting agreement for cable operators covering all of their local origination programming. This agreement was retroactive to 1990. See Attachment A. The scope of BMI's cable system operator license could easily be expanded to include retransmission rights to broadcast signals.

Given all of this evidence of successful negotiations, the cable industry cannot plausibly argue against an open and competitive marketplace for licensing the rights to retransmit broadcast programming. This is especially true when much of the syndicated programming that is now licensed by cable on cable programming services is the same programming that appears on broadcast stations.

C. Cable Has Repeatedly Tried to Reduce Section 111 Payments.

Over the years, the cable industry has taken advantage of the complexity of the cable compulsory license, even with its low rates, to further depress copyright royalties. First, the industry has attempted to arbitrarily allocate only a small portion of its basic tier royalties to distant signals so that cable systems could dramatically reduce their fees. After protracted and expensive litigation, the U.S. Court of Appeals for the District of Columbia Circuit upheld the Office's rule prohibiting this practice. *Cablevision Sys. Dev. Co. v. Motion Picture Assoc. of Am., Inc.*, 836 F.2d 599 (D.C. Cir.), cert. denied, 487 U.S. 1235 (1988). But winning that battle was not the end of the issue. In the years since *Cablevision*, cable operators have begun to package their broadcast signals into low-priced tiers or packages that are in theory available

to subscribers who want broadcast only. The effect of this practice resulted in the lowering of copyright royalties. Virtually every cable subscriber selects the enhanced tier package at the full \$25 per month rate, but the result of making technically available a broadcast-only tier at an artificial price in the range of \$5-10 per month naturally reduces copyright royalties payable under section 111's percentage of revenue rate structure. Copyright owners have had to take legal actions over the years to enforce their rights and to curtail this practice (*cf.* the civil and criminal actions brought by the U.S. Attorney for the Eastern District of Pennsylvania against Lendfest Communications, Inc., based on a "sham" rate theory).

In the past twenty years, the copyright owners have had only one opportunity to seek market-place rates from cable operators. This occurred in the early 1980's when the FCC repealed its distant signal carriage limitation rules. Those rules, along with rules regarding syndicated exclusivity, were among the cornerstones of communications policy upon which the section 111 license was originally based. They limited the number of distant signals a cable system could import into a local market. The CRT set a rate of 3.75% of a cable system's gross basic tier revenues for each non-permitted, non-grandfathered distant signal. This rate is clearly many times higher than the highest rate payable for permitted, grandfathered distant signals under section 111. Of course, the compulsory license contains no express rates for retransmission of local broadcast signals at all (even though operators must pay royalties for at least one distant signal equivalent under section 111 if they only have

local broadcast signals, which provides a "minimum fee" for local signals under the Act).

For a variety of legal and economic reasons relating to changed circumstances, the Copyright Office concluded in an exhaustive study of the cable compulsory license in 1992 that the license should be modified or repealed in its entirety. The Office stated: "the cable license should be adjusted or reformed to account for the economic, regulatory, and technological developments since 1976 . . . because the royalty formula, which is tied to the 1976 FCC cable carriage rules, makes little sense today." THE REGISTER OF COPYRIGHTS, THE CABLE AND SATELLITE CARRIER COMPULSORY LICENSES: AN OVERVIEW AND ANALYSIS, 157-58 (1992). The Office suggested that the satellite carrier per subscriber fee could be a model for the cable license, assuming that the cable license was retained. *Id.* at 158. Interestingly, the Office concluded that the cable license itself should be repealed outright in the event that retransmission consent rules were adopted. *Id.* at 156 ("To the Copyright Office, retransmission consent makes sense only if Congress decides to phase out the cable compulsory license."). Such rules were adopted in the Cable Act of 1992, and upheld by the federal courts against cable's challenge. BMI agrees that it makes no sense to continue to constrain copyright owners.

D. The Satellite Carrier Compulsory License Should "Sunset" on December 31, 1999.

As stated above, no compelling policy reasons exist for continuation of the satellite carrier compulsory license beyond its statutory "sunset" date of December 31, 1999. The Satellite Home Viewer Act of 1988 (Public Law 100-667,

Title II) was originally designed by Congress to exist for a six-year two-phase period: the first phase for four years with statutory royalty rates set by Congress; the second phase with rates negotiated by the parties and, if negotiation failed (as was the case), with rates set by arbitration. In 1994, Congress extended the satellite carrier compulsory license by another five years (until December 31, 1999), but decreed that rates would be established in a manner to most clearly replicate "fair market value" (Public Law 103-198). Assuming that the ongoing CARP proceeding to adjust the satellite carrier compulsory rates achieves this objective, no further statutory extensions will be necessary. After the Millennium, satellite carriers and copyright owners can advance to the next step and negotiate the licensing of broadcast programming in the free marketplace.

E. International Treaties Have Reiterated The Need for the Exclusive Rights of Communications to the Public.

The U.S. copyright industries have become an increasingly important component of the U.S. economy, comprising an estimated 5.7 percent of U.S. GDP. Stephen E. Siwek & Gale Mosteller, *Copyright Industries in the U.S. Economy: The 1996 Report* (International Intellectual Property Alliance (1996)). Moreover, these industries have extensive foreign sales and contribute to reducing the U.S. international trade deficit. Therefore, it is important to promote copyright protection in the U.S. At the recently concluded WIPO conference that resulted in the adoption of the WIPO Copyright Treaty, the exclusive rights of creators and copyright owners in communications to the public were reaffirmed. Similarly, in the recently concluded Uruguay Round of negotiations on GATT, which resulted in the first agreement ever

to incorporate intellectual property rights into international trade laws, the so-called GATT - TRIPS Agreement, a strong consensus emerged for protecting the rights of authors and creators.

III. IF IT IS RETAINED, THE CABLE COMPULSORY LICENSE SHOULD BE REFORMED TO HARMONIZE RATES WITH THE SATELLITE CARRIER COMPULSORY LICENSE.

A. The Section 111 Rates Should Be Converted to Per Subscriber Rates.

BMI shares the consensus view of the copyright owner community that if the cable compulsory license is retained, it should be reformed and harmonized with the satellite carrier compulsory license. In particular, the rates should be revised as per subscriber per month rates for each distant signal carried. These rates should be substantially higher than the current cable rates.

As stated above, BMI is a party to the rate adjustment proceeding underway before the CARP impanelled in the 1996 Satellite Carrier Royalty Rate Adjustment Proceeding, Docket No. 96-3 CARP SRA. The outcome of that proceeding should be market-place-based rates, because section 119 was reformed to make full market value the basis for setting satellite carrier rates for the period for July 1, 1997 through December 31, 1999.

B. The Cable and Satellite Carrier Licenses Should Have Rates That Cover Local Signals as Well as Distant Signals.

One issue in the pending Satellite Carrier Rate Adjustment Proceeding is whether the section 119 compulsory license covers local network signals, and if so, at what rate. At present, satellite carriers can carry network stations at a statutory

section 119 rate provided that the signals are retransmitted to unserved households (using an objective standard). It is BMI's position that the current statute prohibits carriage of all other local network signals. By comparison, the section 111 license does permit local retransmission of independent and network signals. Although it has no express per signal charge for local signals, there is a minimum fee for such carriage. As stated above, BMI believes that the satellite and cable compulsory licenses should not continue to exist; however, in the event they are retained, it is BMI's view that rates should be established under section 111 and section 119 licenses that reflect the value of all local signals, especially if the compulsory license under section 119 will include network signals.

IV. THE SCOPE OF THE COMPULSORY LICENSES IS NARROW.

A. The Cable Compulsory License Should Not Be Extended to Open Video Systems or New Technologies.

It is universally understood that the limitations to the exclusive rights of creators and copyright owners established under section 106 of the Copyright Act of 1976 that are contained in sections 107 through 121 must be narrowly construed by the Office ("The Copyright Office is not imbued with the authority to expand the compulsory license according to public policy objectives." 57 Fed. Reg. 3284, 3292 (Jan. 28, 1992)) and the courts (see, e.g., *Satellite Broadcasting and Communications Assoc. v. Oman*, 17 F.3d 344, 347 (11th Cir. 1994)). This is particularly true in the case of a compulsory license regime that would regulate an entire new industry.

BMI, ASCAP and SESAC filed comments in the Office's rulemaking proceeding regarding the applicability of the cable compulsory license to open video systems. See Attachment B. The Music Claimants believe that Congress must study the new issues posed by this new regulatory structure, in tandem with evolving communications law and policy, as it affects telephone company entry into the video programming business.

One clear problem reflected in the comments filed in that proceeding by open video systems and by telephone companies is their attempt to shoehorn their way into the extremely narrow "passive carrier" exemption currently contained in section 111. By seeking this exemption even while conceding they intend to play an active role in marketing, promoting and navigating users to copyrighted content, the telephone companies (and potentially many others, including Internet access providers and on-line service providers, that may enter the field in the future) implicitly wish to become exempt from all copyright liability. Important issues such as the "passive carrier" exemption need to be fully examined by Congress before any judgment is made that the current, below-market-priced compulsory license be extended.

With regard to the Internet, I am aware of no justification for extending any compulsory license to this revolutionary global broadcasting medium. Many new business models are evolving on a daily basis, and it would stunt market growth to impose an unwieldy regulatory scheme upon these exciting new media ventures. It should be noted that BMI and the Television Music License Committee, which represents virtually all commercial television broadcasters, have just issued a new

Internet license which will permit BMI licensed television stations to make certain limited uses of BMI music to promote their TV stations' programming. This is a landmark license, and there will undoubtedly be further such developments if the free market place is allowed to develop properly.

Bear in mind that the Internet does not contain geographic borders. I cannot even envision how a compulsory license created by the U.S. Congress, with statements of account administered by the Office and rates set by a CARP of American arbitrators, would operate on a worldwide basis.

B. Competition in Multichannel Video Programming Delivery ("MVPD") Is on the Horizon.

Several technological developments promise to revolutionize the television industry. Given the freedom to negotiate free market rates with competing MVPDs, copyright owners would compete and the marketplace would flourish to the benefit of the creative genius of this country. This would serve the constitutional purpose behind the Copyright Act, which is to foster the development of the arts and sciences by securing financial rewards to creators, thereby benefitting the public.

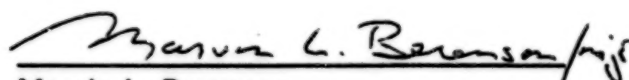
Examples of such competition include the tremendous success of direct broadcast satellite services that have introduced potent new competition to cable. The recent deregulation of the telephone industry to allow telephone companies to enter the market place for video programming services under the Telecommunications Act of 1996 means that the television industry is poised for competitive entries. The advent of advanced ("high definition") television suggests that broadcasters may be able to offer diversity in their programming. Finally, the Internet offers global

broadcasting potential, with new economic and contractual paradigms being announced daily.

Congress is faced with a choice. Will it hobble the exciting growth potential of all of these industries by attempting to cobble together a compulsory license for each and every one of the new media? Or will it, instead, allow the marketplace to create appropriate solutions? BMI believes in the wisdom of the latter.

Respectfully requested,

BROADCAST MUSIC, INC.

A handwritten signature in dark ink, appearing to read "Marvin L. Berenson", is written over a horizontal line.

Marvin L. Berenson
Broadcast Music, Inc.
320 West 57th Street
New York, NY 10019
(212) 830-2533

Dated: April 28, 1997

January 8, 1997

Mr. John M. Shaker
Senior Vice President, Licensing
Broadcast Music Inc.
320 West 57th Street
New York, NY 10019-3790

Re: Request for Licenses

Dear John:

The NCTA Music Licensing Committee, made up of NCTA and CATA members, have been authorized by certain cable operators to apply for BMI blanket and/or per program music licenses pursuant to the BMI Consent Decree. By this letter, we do so on behalf of the entities on the enclosed list ("Licensees"). The licenses we seek on behalf of the Licensees would commence on January 1, 1997.

The license would cover programming locally originated by the Licensees, including programming on the so-called PEG channels, stand alone pay-per-view, and to the degree necessary, local commercials inserted into otherwise licensed programming

We have a working group meeting scheduled for mid-month, and afterward we will be in a position to discuss with you our views on appropriate fees. Other cable operators may also decide to avail themselves of this license request, and we will supplement the list of Licensees as we receive appropriate authorizations.

Thank you for your cooperation on this matter.

Best wishes.

Sincerely,



Daniel L. Brenner

DLB:tkb

Enclosure

cc: James Dolan, Chair, NCTA Music Licensing Committee
Bruce D. Sokler, Esquire, NCTA Counsel
Michael Saltzman, Esquire, BMI Counsel

BMI LICENSEES

(As of 1/8/97)

ALEXCOM, INC.
AMERICAN CABLE ENTERTAINMENT
(a/k/a Scott Cable Communications, Inc.)
ARMSTRONG UTILITIES, INC.
AVENUE TV CABLE SERVICE, INC.
BOOTH AMERICAN COMPANY
BRACKEN CABLEVISION
BRESNAN COMMUNICATIONS, INC.
BUCKEYE CABLEVISION, INC.
CABLEVISION SYSTEMS CORPORATION
COAST CABLEVISION
COMCAST CORPORATION
CONTINENTAL CABLEVISION, INC.
COX COMMUNICATIONS, INC.
EAGLES MERE LAPORTE CABLEVISION, INC.
FANCH COMMUNICATIONS, INC.
FIRST COMMONWEALTH COMMUNICATIONS, INC.
GARDEN STATE CABLE
GREAT SOUTHERN PRINTING & MFG. CO.
GREATER MEDIA CABLEVISION, INC.
HANOVER CABLE TV, INC.
HELICON GROUP, L.P. (The)
ILLINI CABLEVISION, INC.
INTERMEDIA PARTNERS
IRVINE COMMUNITY TV, INC.
JONES INTERCABLE, INC.
LIMESTONE CABLEVISION
MARCUS COMMUNICATIONS, INC.
MASSILLON CABLE TV CORP.

MASTER TELECABLE, INC.
MCKEE TELEVISION ENTERPRISES, INC.
MEDIA GENERAL CABLE OF FAIRFAX, INC.
MERRIMAC AREA CABLE
MID-ATLANTIC TELCOM PLUS, LLC
MID-COAST CABLE TV
MIDWEST CABLE COMMUNICATIONS, INC.
MILLERSBURG TV COMPANY
MOULTRI TELECOMMUNICATIONS, INC.
MULTIMEDIA CABLEVISION, INC.
OMEGA COMMUNICATIONS INC.
PINE BLUFFS COMMUNITY TV SYSTEM
PIONEER CABLE, INC.
POST-NEWSWEEK CABLE, INC.
PRIME CABLE/PRIME MANAGEMENT GROUP
PTI COMMUNICATIONS
RAINBOW CABLEVISION, INC.
RAYSTAY COMPANY
SIOUX FALLS CABLE TELEVISION
SOUTH HOLT CABLEVISION
STUCK CABLE CO.
SUBURBAN CABLE TV CO. INC.
SUMMIT COMMUNICATIONS, INC.
SUMNER CABLE TV, INC.
SUN COUNTRY CABLE, INC. &
SUN WEST CABLE, INC.
SUSQUEHANNA CABLE COMPANY
SYLVAN VALLEY CATV COMPANY
TCA MANAGEMENT COMPANY
TCI COMMUNICATIONS, INC.



AGREEMENT, made at New York, on _____, 199____,
between **BROADCAST MUSIC, INC.**, ("BMI"), a New York corporation with principal
offices at 320 West 57th Street, New York, New York 10019, and
_____ ("LICENSEE"), a
_____ with principal offices at _____
(the "Agreement").

IT IS AGREED AS FOLLOWS:

1. Definitions

As used in this Agreement, the following terms shall have the following respective meanings:

(a) "Term" shall mean the period beginning no earlier than January 1, 1990 and ending December 31, 1996, and as more specifically set forth on Exhibit A attached hereto. "Commencement Date" shall mean the first day of the Term. "Year" shall mean calendar year.

(b) **"Distribution System"** shall mean each cable television system, or other multichannel video program distributor (as such term is defined in Section 76.1000 of the Federal Communications Commission rules) ("MVPD") listed on Exhibit A, as such may be amended from time to time by LICENSEE upon prior written notice, and which is (i) directly or indirectly owned in whole or a majority thereof by LICENSEE, and (ii) which distributed, distributes or will distribute Locally Originated Programming during the Term. An MVPD (e.g., a SMATV system, or MDS or MMDS operator) which distributes Locally Originated Programming in the Territory pursuant to a sub-distribution agreement with LICENSEE shall be deemed a Distribution System for purposes of this Agreement. An MVPD added to Exhibit A of this Agreement pursuant to Paragraph 3(a) shall also be deemed a Distribution System for purposes of this Agreement.

(c) **"Territory"** shall mean the area within the United States of America, its commonwealths, territories and possessions in which LICENSEE's Distribution Systems operate, or are licensed to operate, during the Term.

(d) **"Locally Originated Programming"** shall mean programming (other than satellite-delivered national or regional programming, but including statewide and regional news programming distributed within an ADI or DMA in which the Distribution System is located or an extension thereof where such extension is by fiber or through an interconnect) locally produced, inserted locally or through an interconnect or otherwise originated by, for, or on any of LICENSEE's Distribution Systems, including, without limitation, (i) programming on locally-originated channels programmed by the Distribution System, including advertising and promotional materials thereon; (ii) programming on public, educational and governmental ("PEG") access channels; and (iii) advertising and promotional materials inserted locally or through an interconnect by or on behalf of LICENSEE into national, regional or local cable programming services. However, "Locally Originated Programming" shall not include programming distributed through video-on-demand services, local or distant broadcast television or radio stations, on-line computer networks, national or regional cable programming services (other than statewide and regional news programming distributed within an ADI or DMA in which the Distribution System is located or an extension thereof where such extension is by fiber or through an interconnect, and other than advertising, promotional and other material inserted locally or through an interconnect by or on behalf of LICENSEE), locally originated pay-per-view, multimedia services or interactive games distributed by a Distribution System, or programming transmitted on behalf of third-party lessees of leased access channels on such channels; provided, however, that with respect to any performance of BMI Music in and as part of third party programming carried on leased access channels on LICENSEE's Distribution System, BMI shall not seek further license fees from LICENSEE relating to the distribution of such programming or the performance of BMI Music therein and shall look solely to such third-party programming provider for the payment of any license fees or other licensing obligations with respect to such leased access programming. LICENSEE's total obligation with respect to such third-party leased access programmers shall be to use reasonable efforts to notify such programmers that, as between LICENSEE and such programmers, such programmers are responsible for obtaining music performance rights from appropriate music performance rights organizations.

(e) **"Subscriber"** shall mean each location to which LICENSEE provides Locally Originated Programming. Subscribers shall include each occupied dwelling (whether in a single family dwelling or a multi-unit building), bar, restaurant and other residential or commercial location at which Locally Originated Programming is received through a Distribution System. If LICENSEE provides Locally Originated Programming to multiple dwelling complexes, including, but not limited to, apartments, hotels and

moteis, on a bulk bill basis, the number of Subscribers attributable to each such bulk bill subscriber shall be equal to the total monthly retail rate a complex is charged in the applicable Distribution System for the level or package of services in which the Locally Originated Programming is carried, divided by LICENSEE's standard monthly retail rate a non-bulk rate subscriber is charged in the applicable Distribution System for such level or package of services. For purposes of calculating any Annual Per Subscriber Fee (as set forth in Exhibit B), "Subscribers" will not include (i) any facility used primarily to monitor and control programs telecast on a Distribution System, (ii) any illegal connection not authorized by LICENSEE or a Distribution System, (iii) employees of LICENSEE who are not charged for television services which include Locally Originated Programming, and (iv) subscribers who have not paid their monthly rate to LICENSEE for a given month and are subsequently disconnected; however, the license granted herein will extend to transmissions by Distribution Systems to such viewers. For purposes of this Agreement only, the number of Subscribers for each year of the Term shall be the average of (i) the number of Subscribers as of December 31 of the previous year and (ii) the number of Subscribers as of December 31 of that year for each Distribution System. (For example, the number of Subscribers for Year 1990 shall be the average of (i) the number of Subscribers as of December 31, 1989 and (ii) the number of Subscribers as of December 31, 1990.) LICENSEE may submit appropriate copies of its Copyright Office Statements of Account as filed with the United States Copyright Office pursuant to 37 CFR § 201.17 as verification of its number of Subscribers for each Distribution System for any given period covered by this Agreement.

2. Grant of Rights

(a) BMI hereby grants to LICENSEE for the Term a non-exclusive license to perform in and as part of Locally Originated Programming wherever distributed or supplied by LICENSEE through its Distribution Systems to its Subscribers (or to Subscribers of an MVPD sub-licensed by LICENSEE and listed on Exhibit A or to Subscribers of any other MVPD to the extent it is included on Exhibit A) within the Territory, all musical works, the rights to grant public performance licenses of which BMI may during the Term hereof control ("BMI Music"). This license shall not include dramatic rights or the right to perform dramatico-musical works in whole or in substantial part, or the right to use music licensed hereunder in any other context which may constitute an exercise of "grand rights" therein.

(b) Nothing herein shall be construed as the grant by BMI of any license in connection with any transmission that is not part of Locally Originated Programming distributed or supplied by a Distribution System, and, except as otherwise expressly provided herein (including Paragraph 2(c), below), nothing herein shall authorize LICENSEE to grant to others (including bars, restaurants and other commercial establishments that may be Subscribers) any right to reproduce or perform publicly by

any means, method or process whatsoever, any of the musical compositions licensed hereunder or to authorize any MVPD other than one listed on Exhibit A to publicly perform the musical works licensed hereunder; provided, however, that LICENSEE shall not be responsible for the monitoring, reporting, or preventing of unauthorized public performances of BMI Music by any third party, regardless of the business relationship between LICENSEE and such third party. No license is granted hereunder for: (1) any performance by a satellite delivered national or regional cable programming service (e.g., Home Box Office, Lifetime Television), other than (a) statewide and regional news services distributed within the ADI or DMA in which the Distribution System is located or an extension thereof where such extension is by fiber or through an interconnect, and (b) advertising, promotional, and other material inserted locally or through an interconnect by or on behalf of LICENSEE or (2) local or distant broadcast programming.

(c) This license shall include the right to perform, and to license others to perform pursuant to sub-distribution agreements with MVPDs listed on Exhibit A, BMI Music in and as part of Locally Originated Programming distributed by or through the Distribution Systems to commercial and bulk accounts of LICENSEE, including but not limited to apartment buildings, condominiums, and all other dwelling places, individual hotel rooms and all other rooms of public accommodation. The performances licensed hereunder may originate at any place, whether or not such place is licensed to publicly perform the musical works licensed hereunder. BMI shall not be entitled separately to seek to license the same rights granted LICENSEE in this Agreement or to secure license fees for such rights from such commercial and bulk accounts of LICENSEE. Nothing in this Paragraph shall be deemed to grant a license, to the extent it may be required, to anyone, including LICENSEE, who owns or operates such a place where such Programs originate. However, with respect to any public performance of BMI Music in and as part of Locally Originated Programming at such venue, BMI shall not seek further license fees relating to the distribution of such programming by or through the Distribution System to such venue.

3. License Fee

(a) In consideration of the license granted herein, LICENSEE agrees to pay BMI for each year of the Term hereof a license fee as set forth in Exhibit B (the "Annual Per Subscriber Fee"). LICENSEE will use good faith efforts to perform its reporting and payment obligations on a consolidated corporate entity basis to facilitate where reasonably practicable a single fee report and payment for all Distribution Systems listed on Exhibit A. Except with respect to MVPDs managed by a third party and described on Exhibit D, LICENSEE represents that, to the best of its knowledge, all its Distribution Systems or other MVPDs transmitting Locally Originated Programming containing BMI Music for any part of the period 1990 through 1996 are listed on Exhibit A to this Agreement. LICENSEE may add to Exhibit A any other MVPD it wishes to be

licensed under this Agreement, provided LICENSEE has a management agreement, sub-license or ownership relationship between LICENSEE and such MVPD.

(b) LICENSEE will pay BMI all license fees, if any, computed pursuant to Exhibit B and Paragraph 1(e) accrued for the Years 1990, 1991, 1992, and one-half of fees accrued for 1993 within thirty (30) days of execution of this Agreement. LICENSEE will pay BMI all license fees, if any, computed pursuant to Exhibit B and Paragraph 1(e) accrued for one-half of Year 1993 and all of Year 1994, payable on March 1, 1996. LICENSEE will pay BMI all license fees, if any, computed pursuant to Exhibit B and Paragraph 1(e) for the Year 1995, payable on August 29, 1996. LICENSEE will pay BMI all license fees, if any, computed pursuant to Exhibit B and Paragraph 1(e) for the Year 1996, payable on March 1, 1997.

(c) LICENSEE will submit to BMI a true, accurate, complete, and certified Fee Report in the form attached hereto as Exhibit C at the time which each license fee payment hereunder is due.

(d) BMI shall have the right, during customary business hours and not more than once each year of the Term, on notice in writing of not less than twenty business days, to conduct an audit to verify LICENSEE's Subscriber counts as listed on its Fee Reports, whether there is use of BMI Music, and the identity of its Distribution Systems. The final audit under this provision shall occur within two years after the end of the Term. In any given year audits of multiple systems of LICENSEE shall be limited to no more than 20% or 1, whichever is the greater, of the total number of MVPDs other than any MVPD listed on Exhibit D. BMI may audit such systems for every year of the Term. In the event such audits reveal in a given year a net under-reporting of Subscribers of greater than 5% (for any of the years 1990 through 1994) or 2% (for either 1995 or 1996) of the total number of Subscribers covered by such audits or inaccuracy as to whether an MVPD distributed Locally Originated Programming containing BMI Music during any part of the Term, BMI shall have the right to audit the Subscriber count of additional systems for any three (3) years of the Term. If any audit reveals an underpayment by LICENSEE, BMI shall notify LICENSEE in writing within 120 days of the audit, and BMI's failure to so notify LICENSEE shall constitute a waiver of any claim based on such audit. All information coming to BMI's attention as a result of any such examination shall be held completely and entirely confidential and shall not be used by BMI other than in connection with the administration and enforcement of this Agreement. Notwithstanding the foregoing, if LICENSEE provides to BMI copies of the appropriate sections of its Statements of Account for any Distribution System as filed with the United States Copyright Office pursuant to 37 CFR § 201.17 demonstrating that the number of subscribers used for the calculation of the license fees provided hereunder with respect to any year are not less than the average of subscribers reported on the Statements of Account filed in the United States Copyright Office for such year, including the most recent Statement of Account of the previous

year and calculated in accordance with paragraph 1(e) of this Agreement, then BMI shall not audit such subscriber counts; provided, however, that LICENSEE shall notify BMI in writing of any amended or corrected Statements of Account filed by LICENSEE for such Distribution System for such year. With respect to any Distribution System, if LICENSEE includes such Distribution System on Exhibit A for any year of the Term, then BMI shall not audit with respect to use of BMI Music in Locally Originated Programming on such Distribution System for such year. Nothing in this subparagraph (d) shall be deemed to limit LICENSEE's obligation to make true, accurate, and complete Fee Reports and Exhibit A listing as provided in this Agreement or BMI's right to payment of the license fees otherwise due under this Agreement.

4. Late Payment Charge

BMI may impose a late payment charge of one and one-half percent (1.5%) per month from the date payment was due on any undisputed payment that is received by BMI more than fifteen (15) days after the due date, provided that such due date occurs on or after the date of this Agreement.

5. Music Use Reporting

LICENSEE will provide BMI a true, accurate and complete list of the channel line-up for each MVPD licensed hereunder as of the last day of each half year (i.e., June 30 and December 31) hereafter within the Term; each such list will be due thirty (30) days after the end of the half year. BMI shall have the right further to request from LICENSEE (if it owns more than one MVPD), in writing on not less than fourteen (14) days' notice, video tape recordings (with sound) (or programming and advertising logs or cue sheets, at LICENSEE's option) of up to two channels of programming for one full day (24 hours) per year for not more than 10% or 1, whichever is greater, of the MVPDs of such LICENSEE, such days and channels to be designated by BMI as part of BMI's written request. Each such video tape recording will be provided to BMI within seven (7) days of the designated day for such recording.

6. Release

(a) LICENSEE represents, covenants, and warrants that all MVPDs owned, in whole or a majority thereof, by LICENSEE which transmitted Locally Originated Programming containing BMI Music that is not otherwise licensed while owned by LICENSEE during any period identified for each such MVPD, except for such MVPDs as may be licensed by BMI through another license agreement in form similar to this Agreement, are included in Exhibit A. LICENSEE will add to Exhibit A, pursuant to Paragraph 14, each MVPD acquired by LICENSEE, in whole or a majority thereof, not theretofore listed on Exhibit A within ninety (90) days of such acquisition.

LICENSEE shall only be responsible for license fees under this Agreement accruing after the effective date of such acquisition.

(b) Upon receipt by BMI of the first payment due under this Agreement, BMI releases LICENSEE, its affiliated corporations, officers, directors, agents, employees, successors and assigns, from any and all claims or losses or other causes of action that relate to LICENSEE's use or performance of BMI Music as part of Locally Originated Programming prior to the Term, including without limitation all copyright infringement claims, or claims of a similar nature, known or unknown, which have been brought or which may arise out of such use or performance of BMI Music. BMI and LICENSEE each agree that this Agreement will constitute the final and binding resolution between the parties with regard to LICENSEE's use or performance of BMI Music in Locally Originated Programming prior to and, with respect to Distribution Systems listed on Exhibit A for such years as are listed for each of them, during the Term. Execution of this Agreement by LICENSEE, or the fulfillment of LICENSEE's obligations hereunder, in no way indicates any admission of liability whatsoever by LICENSEE.

7. Withdrawal of Works

Subject to the indemnification provisions of Paragraph 8 of this Agreement, BMI, upon written notice, reserves the right to withdraw from the license granted hereunder any musical work as to which legal action has been instituted in a court of competent jurisdiction or a bona fide claim made that BMI does not have the right to license the performing rights in such work or that such work infringes a composition not in the BMI repertoire (each, a "Withdrawn Work"). A musical work will only qualify as a Withdrawn Work if it is withdrawn by BMI from its repertoire with respect to all BMI licensees.

8. Indemnification

BMI shall indemnify, save harmless and defend LICENSEE, its advertisers and their advertising agencies, all MVPDs listed on Exhibit A and their advertisers and their advertising agencies, and its and their officers and employees (the "Indemnified Parties"), from and against any and all claims, demands or suits that may be made or brought against them or any of them with respect to the performance of any material licensed under this Agreement; provided that this indemnity shall not apply to transmissions of any Withdrawn Work performed by LICENSEE following receipt of written request from BMI to LICENSEE that LICENSEE refrain from performance thereof. BMI will, upon reasonable written request, advise LICENSEE whether particular musical works are available for performance as part of BMI's repertoire. LICENSEE shall provide the title and the writer/composer of each musical composition requested to be identified.

9. Breach or Default

In the event LICENSEE materially breaches or defaults in its performance under this Agreement, BMI shall have the right to cancel this Agreement upon sixty (60) days' prior written notice. For a period of thirty (30) days following such notice, LICENSEE shall have the right to cure any such breach or default, and if LICENSEE cures such breach or default within such thirty day period, BMI's right to cancel the Agreement will terminate upon the date of such cure. In the event LICENSEE does not cure such breach or default, BMI's cancellation shall become effective sixty (60) days after LICENSEE's receipt of written notice thereof. No waiver by BMI of full performance of this Agreement by LICENSEE in any one or more instances shall be a waiver of the right to require full and complete performance of this Agreement thereafter or of the right to cancel this Agreement in accordance with the terms of this Paragraph.

10. Most Favored Nations

Because this Agreement is largely retroactive in scope, is of limited prospective application, is experimental and generally of no precedential value with regard to future agreements regarding uses of BMI Music, BMI and LICENSEE have agreed not to include in the Agreement language providing for most favored nations treatment vis-a-vis other potential distributors of programming comparable to that described in Paragraph 1(d) above and beyond the obligations imposed on BMI pursuant to its consent decree entered in *United States v. Broadcast Music, Inc.* BMI acknowledges LICENSEE's position to be that future license agreements between BMI and LICENSEE should contain a most favored nations provision with respect to the license granted hereunder with regard to other distributors of programming comparable to that described in Paragraph 1(d). The absence of such a provision from this Agreement shall not be asserted as a precedent if and when such a provision is sought by LICENSEE in connection with any future license agreement negotiations or proceedings between BMI and LICENSEE, shall not be deemed a waiver of any right LICENSEE might have to seek such a provision in any future license agreement, and shall not be deemed to derogate from any obligation BMI might have in this respect under the consent decree entered in *United States v. Broadcast Music, Inc.*

11. Arbitration

All disputes of any kind, nature or description arising in connection with the terms and conditions of this Agreement, and not cognizable under Article XIV of the consent decree entered in *United States v. Broadcast Music, Inc.*, shall be submitted to the American Arbitration Association in New York, New York for arbitration under its then prevailing rules, the arbitrator(s) to be selected as follows: Each of the parties

shall, by written notice to the other, have the right to appoint one arbitrator. If, within twenty (20) days following the giving of such notice by one party, the other shall not, by written notice, appoint another arbitrator, the first arbitrator shall be the sole arbitrator. If two arbitrators are so appointed, they shall appoint a third arbitrator. If twenty (20) days elapse after the appointment of the second arbitrator and the two arbitrators are unable to agree upon the third arbitrator, then either party may request the American Arbitration Association to appoint the third arbitrator. The award made in the arbitration shall be binding and conclusive on the parties and judgment may be, but need not be, entered in any court having jurisdiction. Such award shall include the fixing of the costs, expenses and attorneys' fees of arbitration, which shall be borne by the unsuccessful party.

12. Notice

All notices given hereunder shall be duly and properly given if mailed by first-class U.S. mail (certified/return receipt) or by personal delivery to BMI's or LICENSEE's, as the case may be, address set forth above or any other address which the parties hereto may from time to time designate in writing for such purpose. Any notices hereunder shall be deemed given ten (10) business days after mailing in accordance with this Paragraph.

13. Assignment

(a) This Agreement shall inure to the benefit of and shall be binding upon the parties hereto and their respective successors and assigns, but no assignment shall relieve the parties hereto of their respective obligations hereunder; provided that LICENSEE will only be responsible for payment obligations accrued as of and through the effective date of any such assignment. If a Distribution System listed on Exhibit A was purchased by LICENSEE during the Term, LICENSEE shall only be responsible for license fees accruing after the effective date of such purchase.

(b) If LICENSEE sells or otherwise transfers a controlling share of its stock or other ownership interest in one or more Distribution Systems, LICENSEE will delete such Distribution System(s) from Exhibit A and will be relieved of all liability hereunder with respect to such Distribution System(s) from the date of closing going forward. LICENSEE shall provide BMI with the name and address of the acquiring party within thirty (30) days of the effective date of such transfer. LICENSEE agrees to provide BMI with a final payment concerning such Distribution System(s) of any fees accrued as of the date of such sale or transfer, payable at the next scheduled fee payment date in accordance with Paragraph 3(b) of this Agreement. Computation of LICENSEE's fee payment obligation with respect to Subscribers will be pro-rated and based on the number of Subscribers of such Distribution System(s) as of the date of such sale or transfer.

14. Added/Deleted Systems

Subject to the provisions of Paragraph 1(b) of this Agreement, LICENSEE may add any Distribution System or MVPD to this Agreement during the Term upon prior written notice; provided that LICENSEE will only be responsible for payment obligations under this Agreement beginning with the effective date of the addition of such Distribution System or MVPD to this Agreement. Each such Distribution System or MVPD shall be deemed a Distribution System as of the effective date of such addition for purposes of this Agreement and Exhibit A will be deemed amended accordingly. LICENSEE may delete any Distribution System from this Agreement at any time during the Term at such time as such Distribution System is no longer owned by LICENSEE or is listed on Exhibit D.

15. Authority of LICENSEE and Signatory

LICENSEE represents and warrants that it has the authority to enter into this Agreement on behalf of, and to bind, the Distribution Systems, and the owner of such Distribution Systems, if same is not LICENSEE. LICENSEE's signatory represents that he or she has authority to execute this Agreement on behalf of LICENSEE.

16. Construction

(a) This Agreement constitutes the entire understanding between the parties with respect to the subject matter hereof. This Agreement cannot be waived or added to or modified orally and no waiver, addition or modification shall be valid unless in writing and signed by the parties. This Agreement, its validity, construction and effect, shall be governed by the laws of the State of New York. The fact that any provisions herein are found by a court of competent jurisdiction to be void or unenforceable shall not affect the validity or enforceability of any other provisions.

(b) Each party acknowledges that this Agreement was entered into for the purpose of settling and compromising a disagreement between BMI and LICENSEE regarding the proper scope of, and the license fees for, music performance licenses for BMI Music used in and as part of Locally Originated Programming prior to and during the Term only. This Agreement is entered into on a non-prejudicial and experimental basis and does not in any way reflect an agreement between the parties as to (i) the value of the BMI Music performed by LICENSEE, (ii) appropriate increases in license fees on a year-to-year (or any other) basis, or (iii) the terms and conditions that would be appropriate or necessary in any potential future license agreement between BMI and LICENSEE.

Neither party shall submit or otherwise testify as to the contents or the existence of this Agreement without disclosing the terms and conditions enumerated in this Paragraph 16(b). In the event that any law now or hereafter enacted by a state, or political subdivision thereof, in which the LICENSEE or any of its Distribution Systems is located will result in major interference with BMI's ability to license such Distribution Systems, BMI will have the right within sixty (60) days of such enactment to terminate this Agreement with respect to the affected Distribution Systems upon sixty (60) days' written notice to LICENSEE.

BROADCAST MUSIC, INC

By: _____
(Signature)

(Print Name of Signer)

(Title of Signer)

LICENSEE (Legal Name)

By: _____
(Signature)

(Print Name of Signer)

(Title of Signer)

a1000.doc
5/29/98

EXHIBIT A

<u>Cable System or other MVPD</u>	<u>Owner</u>	<u>Prior Owner*</u>	<u>Principal Operating Area</u>	<u>Term**</u>
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* If acquired in whole or more than fifty percent on or after January 1, 1990.

** Or effective date if added pursuant to Paragraph 3(a) or Paragraph 14.

Page ____ of ____

EXHIBIT B

<u>Calendar Year</u>	<u>Annual Per Subscriber Fee</u>
1990	\$0.025
1991	\$0.040
1992	\$0.045
1993	\$0.055
1994	\$0.060
1995	\$0.070
1996	\$0.075

Notes: The number of Subscribers will be calculated as provided in Paragraph 1(e) of the Agreement.

With respect to the years 1990 through 1994, LICENSEE is only obligated to pay BMI the Annual Per Subscriber Fee for years in which LICENSEE actually distributed Locally Originated Programming containing BMI Music. For example, if LICENSEE only distributed Locally Originated Programming containing BMI Music in 1992, 1993 and 1995, LICENSEE will have no payment obligations to BMI with respect to calendar years 1990, 1991, and 1994, and will have payment obligations for 1992, 1993, 1995 and 1996. LICENSEE, once agreeing to include a Distribution System on Exhibit A for 1995, is accepting a license for that Distribution System for the entire balance of the Term and will pay for both 1995 and 1996; it being understood, however, that LICENSEE does not hereby commit to such a requirement in any future agreement with BMI. LICENSEE shall have no obligation to pay BMI any fees with respect to any music performed prior to calendar year 1990.

For payment schedule, see Paragraph 3(b) of the Agreement.

EXHIBIT D

**Cable System
or Other MVPD**

Owner

Manager*

Principal Operating Area

- * Includes any person or entity responsible for system operations, including music licensing obligations; information to include name, address and contact person.

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RM	96 - 2
No.	8

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GENERAL COUNSEL
OF COPYRIGHT

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----- X	:	
	:	
In the Matter of:	:	
	:	
ELIGIBILITY FOR THE	:	Docket No. 96-2
CABLE COMPULSORY LICENSE	:	
	:	
----- X	:	

COMMENTS OF THE AMERICAN SOCIETY OF
COMPOSERS, AUTHORS AND PUBLISHERS,
BROADCAST MUSIC, INC., AND SESAC, INC.

The American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI") and SESAC, Inc. ("SESAC") (collectively "Music Claimants") submit the following reply comments in response to the Copyright Office (the "Office") Notice of Inquiry, 61 Fed. Reg. 20197 (May 1, 1996), as amended by 61 Fed. Reg. 27322 (May 24, 1996).

Music Claimants have reviewed the initial comments filed by all other parties concerning the eligibility of open video systems that retransmit broadcast signals for the cable compulsory license, 17 U.S.C. § 111. For the reasons set forth below, Music Claimants believe that the determination of that eligibility is a policy matter for Congress, not the Office. Further, should the Office determine that, as a regulatory matter, open video systems are eligible for the cable compulsory license, Music Claimants believe that open video systems would

not be entitled to the passive carrier exemption set forth in 17 U.S.C. § 111(a)(3).

DISCUSSION

I. WHETHER OPEN VIDEO SYSTEMS ARE ELIGIBLE FOR THE CABLE COMPULSORY LICENSE IS A POLICY MATTER FOR CONGRESS.

Music Claimants agree with the Motion Picture Association of America, Inc. ("MPAA") and Joint Sports Claimants that Congress is the appropriate body to determine whether the cable compulsory license should be extended to open video systems. As MPAA and Joint Sports Claimants aptly observe, open video systems do not fit comfortably within the statutory definition of "cable system" under 17 U.S.C. § 111(f). Comments of Motion Picture Association of America, Inc. on the Eligibility of Open Video Systems for Cable Compulsory License ("MPAA Comments"), Docket No. 96-2 at 2-3, 5-9; Comments of the Joint Sports Claimants ("Joint Sports Comments"), Docket No. 96-2, at 1-5, 8-9.

Nor is the legislative history concerning authorization of open video systems clear on this point. Those in support of extending Section 111 to open video systems argue that because Congress authorized open video systems as a way of introducing competition to the cable industry Section 111 must apply to open video systems. E.g., Comments of U S West, Inc. on the Copyright Office's Notice of Inquiry Regarding the Eligibility of Open Video Systems for the Cable Compulsory License ("U S West

Comments"), Docket No. 96-2, at 2-4. This simply does not follow.

Section 111 was crafted twenty years ago to respond to the needs of a then small, localized and clearly defined cable industry. See MPAA Comments at 2-3; Joint Sports Comments at 6-8. The structure of open video systems was unheard of in 1976. Indeed, in 1976, the telephone companies -- the principal operators of open video systems -- were prohibited from entering the very same business whose regulatory protection they now seek. Joint Sports Comments at 7-8.

Moreover, an amendment to the Telecommunications Act of 1996 was proposed by the telephone companies that would have extended the cable compulsory license to open video systems. But, the amendment was not included in the final version of the Act. Joint Sports Comments at 5-6. Accordingly, there is no clear statement from Congress that Section 111 should be extended to open video systems.¹

1. Capital Cities/ABC, Inc. ("ABC") makes two important points worthy of the Office's consideration should the Office nevertheless determine that Section 111 is applicable to open video systems. First, in that event, ABC cautions the Office to "avoid any suggestion [in its regulations] that customers of a telephone company might qualify as a 'cable system' under Section 111 when retransmitting broadcast programming through a computer network." Second, ABC reminds the Office that any regulations in this area should not, unintentionally, cast doubt on prior Office and judicial determinations that satellite carriers do not qualify as Section 111 cable systems.

In addition, MPAA and Joint Sports Claimants aptly observe that, in the past, the Office determined that newly emerging forms of delivery systems were not entitled to the cable compulsory license. Rather, new delivery services have had to seek Congressional relief -- either to extend the coverage of Section 111 or create a new compulsory license, as in the case of the satellite carriers. MPAA Comments at 3; Joint Sports Comments at 3-5. Indeed, satellite carriers may compete with cable systems; however, Congress did not try to shoehorn this industry within Section 111. Similarly, the copyright implications of the local retransmission of low-power television stations and wireless cable systems had to await Congressional action. See Pub. L. No. 99-397, 100 Stat. 848 (1986) (low-power television); Satellite Home Viewer Act of 1994, Pub. L. No. 103-369, § 3, 108 Stat. 3477, 3480-81 (1994) (including microwave cable systems under Section 111).²

MPAA also notes that no open video system is yet operational and that establishment of a regulatory system by the Office now is, essentially, premature. MPAA Comments at 1-2. In

2. Arguments that this legislative history manifests congressional intent that the Copyright Office should expand the scope of the cable compulsory license through regulation, Joint Comments Before the Copyright Office of Bell Atlantic, BellSouth, NYNEX, Pacific Telsis Group and SBC Communications, Docket No. 96-2 at 17-19 ("Joint Comments of Bell Atlantic, BellSouth, NYNEX, Pacific Telsis Group and SBC Communications"), are clearly at odds with the actual legislative approach adopted by Congress in addressing the application of statutory licenses to new retransmission means.

its Notice of Inquiry, even the Office stated that "[t]he structure and appearance of open video systems remains largely unresolved at this time." 61 Fed. Reg. at 20198. See also Federal Communications Commission Third Report and Order and Second Order on Reconsideration ("FCC Third Report"), 61 Fed. Reg. 43160, 43172 (August 20, 1996) ("[n]o open video systems have yet been certified to operate").

Finally, it is worth noting that, with respect to rules and policies concerning open video systems, the FCC consistently makes the point that open video systems are not subject to precisely the same regulatory burdens as cable systems -- "Congress established cable and open video systems as two distinct video delivery models, each offering a particular combination of regulatory benefits and burdens." FCC Third Report at 43162. It also follows that an open video system with different regulatory benefits and burdens than cable systems may not be entitled to the benefits of the cable compulsory license.

Under these circumstances, Music Claimants believe it would be entirely inappropriate for the Office to determine now that open video systems are eligible for the cable compulsory license.

II. THE PASSIVE CARRIER EXEMPTION IS INAPPLICABLE TO OPEN VIDEO SYSTEMS.

The telephone companies seek coverage under Section 111 for their activities as program providers, but maintain that when

they operate as a platform for other program providers, they ought to qualify for the passive carrier exemption of 17 U.S.C. § 111(a)(3). We believe that open video system operators fall well outside the exemption when they operate in that capacity.

Section 111(a)(3) provides that, in order to qualify for the passive carrier exemption, the secondary transmission must be

made by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others; Provided, That the provisions of this clause extend only to the activities of said carrier with respect to secondary transmissions and do not exempt from liability the activities of others with respect to their own primary or secondary transmissions.

(Emphasis added.)

Open video system operators may program their system's channel capacity with programming they choose³. In these circumstances, open video system operators have "direct" control over the "content or selection of the primary transmission" and their activities do not consist "solely" of providing wires, cables, or other communications channels. The legislative

3. If demand for channels exceeds the channel capacity of the open video system, the open video system operator will be restricted to programming only one-third of its channel capacity. Telecommunications Act of 1996, Pub. L. No. 104-104, § 653, 110 Stat. 53, 121-22 (1996).

history of Section 111 states that the passive carrier exemption "extends to secondary transmitters that act solely as passive carriers." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 92 (1976); Senate Rep. No. 94-473, 94th Cong. 1st Sess. 78 (1976) (emphasis added). Therefore, they are not eligible for the passive carrier exemption when they program their system's channel capacity with programming they choose.

Open video systems also are not eligible for the passive carrier exemption when they serve as a platform for another video programming provider because they participate in activities outside the passive carrier definition. Open video systems may engage in many activities that may push them "well" outside the exemption, e.g., decisions regarding division of channel capacity and sharing of channels, signal scrambling and selling and leasing descramblers. Comments of Comcast Cable Communications, Inc., Docket No. 96-2, at 4-5. In addition, Music Claimants note that open video systems may perform billing and collecting functions as well as create navigational tools for other program providers. E.g., Joint Comments of Bell Atlantic, BellSouth, NYNEX, Pacific Telsis Group and SBC Communications, at 37; FCC Third Report at 43169-70.

While U S West concedes that these activities could be "viewed as activities outside the passive carrier exemption", U S West Comments at 10, Congress and the Office already have reviewed some of these activities and concluded, for example,

that merely scrambling a signal and selling, leasing or renting descramblers is sufficient to place a carrier outside of the Section 111(a)(3) exemption.

In enacting the Satellite Home Viewer Act of 1988, Congress reviewed the passive carrier exemption for satellite systems that scrambled their signals and sold, leased or rented descramblers to individuals. Congress determined that a new statutory license should be established for such satellite systems because their activities were likely to be outside of the passive carrier exemption:

Congress did not contemplate that carriers would be engaged in marketing signals to home dish owners when it enacted the section 111(a)(3) exemption. By selling, renting, or licensing descrambling devices to subscribing earth station owners, a carrier exercises direct control over which individual members of the public receive the signals they retransmit. Moreover, these activities represent a far more sophisticated and active involvement in selling signals to the public than does an act of merely providing 'wires, cables, or other communications channels.'

H.R. Rep. No. 887, 100th Cong., 2d Sess., Pt. 1, at 13 (1988).

The Register of Copyrights, in commenting on the potential effect on a carrier's Section 111(a)(3) exemption of selling, leasing or renting descramblers (even without scrambling the signals themselves) to satellite dish owners, explained:

[I]n selling or renting descrambling devices to some earth station owners, the [satellite] carriers would appear to exercise control over the recipients of the programming. . . . Moreover, since licensing or descrambling devices would appear to be a far more sophisticated and active function than the passive function of merely providing 'wires, cables, or other

communications channels,' even those carriers who seek to license signals encrypted by someone else would lose their 111(a)(3) exemption. . . .

Therefore, I reach the preliminary judgment in this difficult and controversial area of the law, that the sale or licensing of descrambling devices to satellite earth station owners falls outside the purview of section 111(a)(3). . . .

Letter from The Honorable Ralph Oman, Register of Copyrights, to The Honorable Robert W. Kastenmeier, Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice 3 (March 17, 1986) reprinted in Copyright and New Technologies: Hearings Before the Subcomm. On Courts, Civil Liberties, and the Administration of Justice of the House Comm. On the Judiciary, 99th Cong., 1st & 2d Sess. 317, 319 (1985 & 1986) (emphasis in original) (hereinafter "Oman Letter").⁴

It is also noteworthy that, in finding that satellite carriers would not be eligible for the cable compulsory license, the Office stated that the "passive carrier exemption was in effect the antithesis of the compulsory license, and that activity interpreted as exempt under Section 111(a)(3) could not

4. Arguments that the decision in Eastern Microwave, Inc. v. Doubleday Sports, Inc., 691 F.2d 125 (2d Cir. 1982), allows open video systems operators to use the passive carrier exemption, even if they perform services beyond merely transporting the signals of others, Joint Comments of Bell Atlantic, Bell South, NYNEX, Pacific Telesis Group and SBC Communications at 33-34, fail analysis. Congress, with assistance from the Office, was well aware of the Eastern Microwave decision in arriving at the determination that selling, renting or leasing descramblers would inevitably take the satellite carriers outside of the passive carrier exemption. See H.R. Rep. No. 887, 100th Cong., 2d Sess., Pt. 1, at 12-13 (1988).

be licensed under Section 111(c)." Comments of the National Association of Broadcasters, Docket No. 96-2 at 10. Music Claimants know of no cable system subject to the cable compulsory license that also qualifies for the passive carrier exemption.

While it is true that the passive carrier exemption was created with the telephone company (AT&T) in mind, see Oman Letter at 1, in an open video system setting, telephone companies will act in a very different capacity than they do in performing their primary function in the national communications infrastructure. Therefore, application of the passive carrier exemption would be in error.

CONCLUSION

In sum, Music Claimants respectfully submit that the determination of whether open video systems are eligible for the cable compulsory license is a policy matter for Congress to decide. Accordingly, the Office should rule that as a regulatory matter open video systems are not eligible for the cable compulsory license. However, should the Office determine that Section 111 is applicable in these circumstances, the passive carrier exemption should not be extended to open video systems when they serve as a platform for other video program providers.

Respectfully submitted,

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April 28, 1997

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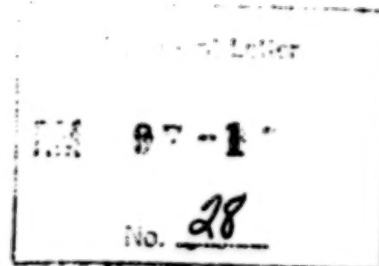
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Re: Compulsory License Revision, Docket No. 97-1

Dear Mr. Roberts:

Enclosed please find for filing an original and fifteen copies of the comments of the Public Broadcasting Service in the above-captioned proceeding. Please have a copy of the document stamped and returned to our messenger as proof of filing.

The notice for this proceeding requested a glossary of technical terms used in the written testimony. We do not believe there are any terms in the testimony that are technical in nature, and we expect that the terms used will all be familiar to the Copyright Office. If our understanding is incorrect and you would like us to provide a glossary, please contact me at the number listed above.

Thank you for your assistance with this matter.

Sincerely yours,

Michele J. Woods

Michele J. Woods

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Revision of the Cable and
Satellite Carrier
Compulsory Licenses

Docket No. 97-1

**WRITTEN STATEMENT OF TESTIMONY OF
THE PUBLIC BROADCASTING SERVICE**

Comment Letter
DA 97-1
No. 28

Paula A. Jameson
Senior Vice President, General
Counsel and Secretary
Gregory Ferenbach
Deputy General Counsel
Public Broadcasting Service
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April 28, 1997

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Before the
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Revision of the Cable and
Satellite Carrier
Compulsory Licenses

Docket No. 97-1

WRITTEN STATEMENT OF TESTIMONY OF
THE PUBLIC BROADCASTING SERVICE

The Public Broadcasting Service ("PBS") submits these comments in response to the notice of public meetings and request for comments issued by the Copyright Office on March 17, 1997, in the above-captioned proceeding, 62 Fed. Reg. 13396 (1997). PBS is a non-profit membership organization whose members are licensees of virtually all of the nation's public television stations. PBS provides, among other things, national program distribution and other program-related services to the nation's public television stations and the general public. PBS represents all public television claimants, including all PBS member stations and other copyright owners of programming broadcast on public television stations, in compulsory license rate-setting and royalty distribution proceedings before the Library of Congress.

Introduction and Summary

The Copyright Office has instituted this proceeding in order to conduct a comprehensive review of the copyright licensing of broadcast retransmissions for the purpose of recommending legislative changes to Congress. In these comments, PBS addresses issues that are of particular significance for public television operations. Public television is unique in its noncommercial status and its statutory and corporate mission to make educational and cultural programs available to a wide audience. In considering possible changes to the compulsory copyright licensing scheme, the Copyright Office should take into account the special interests and needs of public television.

The existing cable and satellite compulsory licenses provide an efficient method for clearing rights and establishing royalty rates, thereby facilitating the distribution of programming and the full development of these technologies. The compulsory licenses are particularly important to public television in view of Congress's goal of universal access to public television services and the special difficulties public television entities face in attempting to clear rights through free market negotiations. For this fundamental reason, the existing compulsory licenses should be continued, at least as they apply to public television uses.

PBS believes there is no need for significant changes in the basic configurations of the cable and satellite compulsory

licenses, particularly in view of the fact that parties have developed settled expectations based on the current scheme. Unification of all licenses in a single license would be difficult and at the very least would require creation of separate provisions of law to deal with the differences among technologies. While it may be worth studying further the feasibility of establishing uniform criteria for royalty rates, a strong showing should be required to justify any significant change. In view of the important local interests served by public television stations across the country and the confusion caused to public television viewers by the importation of distant stations into their homes, PBS favors retention of the "white area restriction" in the satellite compulsory license as it applies to the distant retransmission of public television station broadcast signals. To the extent the Copyright Office considers recommending significant changes in the existing compulsory licenses that would interfere with the longstanding government interest in universal access to public television, it should recommend an exemption or a separate license for public television uses.

The compulsory license scheme should be expanded to cover additional uses for public television. Public television offers extensive resources that can be used to help the nation reach important educational goals. In view of the special obstacles public television faces in negotiating rights in the

free market, some form of compulsory license is needed in order to ensure that public television services will be accessible through emerging distribution technologies. PBS hopes to obtain legislation that would extend a compulsory license to permit nationwide transmission of PBS program services to direct broadcast satellite subscribers. Such legislation would advance Congress's goal of providing all citizens with access to public broadcasting service through all appropriate technologies. Moreover, extension of the compulsory license to cover nationwide satellite transmission of PBS program services is particularly important because it would help ensure that DBS providers can comply with their obligation under the 1992 Cable Act to set aside capacity for noncommercial educational programming services. Compulsory licenses should also be extended to cover public broadcasters' use of public television programming via new technologies, including the Internet. Such an extension of the compulsory licensing scheme is a crucial step toward maximizing opportunities for distribution of educational services.

Overview of Public Television

A. The Public Television System

The mission of public television is to serve communities across the country by providing informational, educational and cultural programming that is not generally available on commercial media. Congress has found repeatedly

that public television serves an important purpose because "the economic realities of commercial broadcasting do not permit widespread commercial production and distribution of educational and cultural programs which do not have a mass audience appeal."¹ To overcome this market failure, Congress and the Federal Communications Commission ("FCC") have worked together to fashion a system of locally oriented public television stations that are "uniquely fitted" to offer "programs of high quality, obtained from diverse sources."²

In 1952 the FCC, pursuant to its statutory mandate to distribute the available broadcast television channels in a "fair . . . and equitable" manner, 47 U.S.C. § 307(b), reserved nearly one-third of the nation's broadcast television channels for noncommercial educational users. See Sixth Report and Order, Television Assignments, 41 F.C.C. 148, 158-67 (1951); Television Table of Allotments, 47 C.F.R. § 73.606 (1996). This reservation was intended to promote a television service "of an entirely different character from that available on most commercial stations." FCC, Third Notice of Further Proposed Rulemaking on Television Assignments, 16 Fed. Reg. 3072, 3079 (1951).

¹ H.R. Rep. No. 572, 90th Cong., 1st Sess. 1 (1967), reprinted in 1967 U.S.C.C.A.N. 1799, 1801.

² S. Rep. No. 222, 90th Cong., 1st Sess. 1 (1967), reprinted in 1967 U.S.C.C.A.N. 1772, 1779; see generally 47 U.S.C. § 396 (1991).

The FCC's initial reservation of 240 channels in 1952 has grown into a noncommercial broadcast infrastructure of approximately 350 public television stations, spread across the country's 211 television markets. The substantial funding necessary to construct and operate this infrastructure has come from a wide variety of public and private sources. As of 1992, the federal government had expended nearly \$3 billion on public broadcasting since 1969.³ State and local governments had contributed nearly \$5 billion since 1972.⁴

Public television is a non-profit service and offers programming without commercial interruption. Entities that operate public television stations must be noncommercial educational institutions, and they are diverse in terms of their ownership and mission. Some stations are operated by civic non-profit organizations governed by a board of community trustees; others are operated by state boards of education or other state governmental agencies; others are operated by universities or colleges; and a few are operated by local school districts.

Public television stations have distinctive identities within local communities across the country, offering a range of programming types and diverse schedules. The objective of public television is to provide a wide-ranging mix of programs that appeal to different niches of viewers. Over the course of any

³ Pub. L. No. 102-385, § 2(a)(8), 106 Stat. 1460 (1992).

⁴ H.R. Rep. No. 628, 102nd Cong., 2d Sess. 69 (1992).

given month, some 80% of U.S. television households watch public television.

Public television has had a tradition of technical leadership in the support of educational and public service goals. The first to develop closed captioning, descriptive video, and stereo television services, and to transmit television programming by satellite, public television is now at the forefront of the development of advanced digital television.

B. Congress's Goal of Universal Access to Public Television

Congress has stated as a national goal that there should be universal access to public television.⁵ Time and again Congress has made clear that access to public television services should not be limited simply to the terrestrial broadcast medium, but should be extended to other distribution technologies. As early as 1967, Congress decreed that

it is in the public interest to encourage the growth and development of nonbroadcast technologies for the delivery of public telecommunications services.⁶

In 1978, Congress noted that public television should "make the maximum use practicable" of new technologies.⁷ Similarly, in

⁵ See, e.g., Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 4, 106 Stat. 949 (1992) (amending 47 U.S.C. § 396(a)).

⁶ 47 U.S.C. § 396(a)(2).

⁷ See, e.g., S. Rep. No. 858, 95th Cong., 2d Sess. 6 (1978).

1988, when Congress funded public broadcasting's new satellite interconnection system, the House Report stated:

it is critical that the public broadcasting system be able to take advantage of technologies such as advanced television technologies, including HDTV, interactive video and digital data distribution.⁸

In 1992, when Congress authorized additional funds for public broadcasting, it again found that

it is in the public interest for the Federal Government to insure that all citizens of the United States have access to public telecommunications services through all appropriate available telecommunications distribution technologies.⁹

The House Report stated that the 1992 legislation

strongly endorses a policy of broad access to the essential public services offered by telecommunications, regardless of the technology used to deliver those services, in order to advance the compelling governmental interest in increasing the amount of educational, informational, and public interest programming available to the nation's citizens.¹⁰

C. The Role of PBS

PBS is structured as a voluntary non-profit membership organization and is owned by its member stations, which pay dues to PBS. All but a few public television stations are PBS members. PBS helps finance the production or acquisition of

⁸ H.R. Rep. No. 825, 100th Cong., 2d Sess. 14 (1988).

⁹ Pub. L. No. 102-356, § 4, 106 Stat. 949 (1992) (emphasis added).

¹⁰ H.R. Rep. No. 363, 102nd Cong., 1st Sess. 18 (1991).

programming, which it schedules and makes available to stations around the country by satellite. PBS does not itself produce this programming, but contracts with program producers (including numerous independent producers, as well as many member stations) to acquire the programming. PBS also provides stations with assistance in research, fundraising, and program promotion; more generally, PBS plays an important role in making public television more visible, both locally and nationally. PBS does not operate a "network" on the commercial model. It does not own or operate any public television stations, nor does it have station affiliates as that term is ordinarily used in the television industry. Unlike commercial networks, PBS does not pay fees to its member stations to carry programming. Instead, stations pay programming assessments to PBS to finance its activities.

Virtually all PBS member stations acquire some programming from non-PBS sources, and most also produce programs for local use. Each station is free to define its own particular focus, to decide on its mix of programming, and to formulate a schedule for its programs. PBS member stations may broadcast programs provided by PBS when they are transmitted via satellite, or hold them for showing at a later date.

PBS also provides a rich variety of educational programming directly to the public and to educational institutions, for example, through its popular distance learning courses

offered by broadcast, satellite and videocassette, through the PBS ONLINE® Website, and through PBS Home Video®.

D. Relevant Regulatory Schemes

Public television is covered by various regulatory provisions that are relevant to the Copyright Office's review in this proceeding. Within the Copyright Act itself, retransmission of public television station signals is included within the cable compulsory license for secondary transmissions by cable systems of a primary transmission made by a broadcast station under 17 U.S.C. § 111. In addition, public television stations are included in the definition of the term "network stations" in 17 U.S.C. § 119, and retransmission of their signals is thus included within the satellite carrier compulsory license.

In recognition of the special circumstances of public broadcasting, Congress has also provided a compulsory license specifically directed to various uses in public broadcasting of published nondramatic musical works and of published pictorial, graphic and sculptural works. 17 U.S.C. § 118(d). Under several other provisions of the Copyright Act, Congress has similarly established exemptions for various educational uses, including certain uses of copyrighted material in public broadcasting. See, e.g., 17 U.S.C. § 110(2) (performance or display of nondramatic literary or musical work); id. § 110(8) (performance of nondramatic literary work in course of transmission directed to blind or deaf persons); id. § 112(b) (copies of transmission

programs embodying performance or display of nondramatic musical and literary works); id. § 112(d) (copies embodying performances of nondramatic literary works); id. § 114(b) (transmission of sound recordings).

As part of its longstanding commitment to ensure that public television services are universally accessible to the American public, Congress has enacted several provisions requiring retransmission providers to carry public television signals. Under Section 5 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), 47 U.S.C. § 535, cable operators are required to carry a certain number of local public television signals.¹¹ Under Section 25(b) of that Act, 47 U.S.C. § 335(b), providers of direct broadcast satellite ("DBS") service must set aside between four and seven percent of their channel capacity for "noncommercial programming of an informational or educational nature."¹²

¹¹ The Supreme Court recently upheld the cable "must-carry" provision against a First Amendment challenge. Turner Broadcasting System, Inc. v. FCC, No. 95-992 (U.S. Mar. 31, 1997).

¹² DBS providers are to satisfy this requirement by making capacity available to "national educational programming suppliers" on "reasonable prices, terms, and conditions." 47 U.S.C. § 335(b)(3). The term "national educational programming supplier" includes public television stations, other public telecommunications entities, and educational institutions. 47 U.S.C. § 335(b)(5)(B).

In August 1996, the United States Court of Appeals for the District of Columbia Circuit upheld the constitutionality of the DBS set-aside provision. Time Warner Entertainment Co. v. FCC, 93 F.3d 957, 973-77 (D.C. Cir. 1996).

In addition, under 47 U.S.C. § 605(c), PBS is required to maintain an unencrypted feed of its National Program Service, so that it can be received by home satellite dish owners. This provision assured access to PBS programs via larger C-band dishes long before the advent of today's high-powered Ku-band DBS services. PBS continues to make this service available to C-band satellite viewers.

Comments

I. Existing Cable and Satellite Compulsory Licenses Should Continue.

The Notice asks initially whether there is a continuing need for the cable and satellite compulsory licenses or whether cable and satellite carriers should be required to negotiate the licensing of broadcast programming in the free marketplace. There is unquestionably a continuing need for both compulsory licenses; this need is particularly strong with respect to public television. At least in connection with public television uses, existing compulsory licenses should be continued on a long-term basis.

A. The Existing Licenses Serve Important Functions in Connection with All Broadcast Retransmission.

The compulsory licenses for both cable and satellite serve important functions for all broadcast retransmission, whether commercial or noncommercial programming is involved. These licenses provide an efficient mechanism for clearing rights

for retransmission of copyrighted material and for establishing rates associated with such retransmission.

In most cases a broadcaster does not own the right to authorize retransmission of its entire signal; these rights are typically dispersed among a variety of program producers and other rights holders. In the absence of a compulsory license, it would be necessary for the interested parties to engage in a large number of burdensome transactions in order to clear the rights needed to permit retransmission of the signal. Each transaction would be a multi-tiered affair, requiring the participation of the program copyright holder, the underlying rights holders, the broadcaster, and the cable or satellite operator. As Congress recognized when it enacted the cable compulsory license, "it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system."¹³ Without a compulsory license, some retransmissions undoubtedly would not occur because the costs entailed in clearing the rights would be too high to justify the negotiation.¹⁴

Compulsory licenses eliminate the need for numerous individualized transactions by conferring blanket authority to

¹³ H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89 (1976).

¹⁴ This is especially true for public television programs, whose producers often have more limited resources. See page 16, infra.

retransmit broadcast material and providing an administrative mechanism for determining fair royalty rates and collecting and distributing royalties. The result is to reduce significantly the transaction costs that would be generated if the parties had to resort to free-market negotiations.¹⁵ Compulsory licenses thus promote the efficient dissemination of information, while ensuring that rights holders receive appropriate compensation for use of their work.

Compulsory licenses also foster the development of new communications technologies that depend on retransmission of existing material. It is almost impossible to imagine, for example, that the cable industry could have emerged as a major alternative to over-the-air broadcast television without the aid of the cable compulsory license. Continuing the license will help cable to enhance further its technology and services. Similarly, the rapid development of the DBS industry over the past few years has been due in part to the satellite compulsory license, which has afforded DBS providers the ability to retransmit broadcast signals. Continuing the existing satellite license will help DBS to grow further, allowing it to provide more services to consumers and become a stronger competitor to cable, as Congress intended.

¹⁵ This is most evident in the case of cable, because there are so many cable operators. However, the compulsory license also reduces transaction costs significantly in the satellite industry. See pages 32-33, infra.

There appears to be no good reason to terminate the existing compulsory licenses. For the most part, the compulsory license system has worked smoothly. Both the cable and satellite licenses have been in place for a number of years, and parties have developed expectations based on the existing scheme. Undoubtedly there are certain respects in which the administration of the compulsory licenses could be improved. However, wholesale elimination of these licenses would disrupt business arrangements in significant ways.

The recent decision upholding the constitutionality of the cable must-carry provisions presents an additional reason to retain the existing compulsory licenses.¹⁶ Congress has regarded carriage requirements and the cable compulsory license as complementary aspects of regulation. See, e.g., S. Rep. No. 102-92, 102nd Cong., 1st Sess. 41 (1991). If cable operators "must carry" local broadcast signals, elimination of the compulsory license would put the operators in an untenable negotiating position. It certainly would be difficult for cable operators to fulfill their must-carry obligations if they had to assume the burden of negotiating with individual rights holders in order to carry local broadcast signals. The compulsory license is needed in order to ensure that the important

¹⁶ See page 11 note 11, supra. Obviously, any argument that the cable compulsory license should be repealed because the must-carry requirements allegedly are invalid must be rejected.

government interests underlying the must-carry provisions are served.

B. Continuation of the Existing Licenses Is Particularly Important for Public Television.

Public television has a particularly strong need for continuation of the existing compulsory licenses. As explained in the Overview section above, public television has a unique educational mission, and Congress has repeatedly articulated the goal of universal access to public television services through all technologies. The existing compulsory licenses serve that goal by facilitating dissemination of public television programming to cable and satellite subscribers. In addition, by helping to ensure universal access to public television services, continuation of the compulsory licenses helps preserve the very substantial investment in public television made by the public through tax dollars and viewer contributions.

In addition, the compulsory licenses are of special importance to public television due to the limited resources of public television organizations. Public television stations and PBS itself are non-profit entities with limited financial resources and limited personnel. They simply do not have the ability to devote significant resources to the time-consuming negotiations that would be required to obtain all necessary rights under a free market regime.

Moreover, PBS and public television program producers often have difficulty persuading copyright holders to spend time

negotiating all of the necessary rights, or even to provide basic information needed for such negotiations. Some copyright holders are reluctant to spend the time and money required in order to reach agreement in view of the low financial return often associated with noncommercial uses of programming. Compulsory licenses eliminate this impediment to the use of certain works by public broadcasters, while at the same time providing a mechanism for the fair compensation of rights holders.

These points are not merely theoretical. PBS and other public television entities encounter significant difficulties when they attempt to clear rights for uses that are not covered by a compulsory license. For example, PBS and the producers of EYES ON THE PRIZE, the award-winning documentary about America's civil rights movement, have struggled for years, without success, to clear certain additional non-broadcast rights for just this one series. In addition, in the past few years PBS and several member stations have attempted to obtain through negotiation all the rights needed to be able to transmit the PBS National Satellite Service to DBS subscribers other than those in "unserved" households. Due to the obstacles encountered, PBS has concluded that this process could take many years to complete, if it is possible at all. See pages 32-33, infra.

As a further example, the Independent Television Service, a major non-profit public television program provider, has advised PBS that it has simply been unable in many cases to

clear music rights due to uncertainty concerning the scope of the compulsory broadcast license conferred by section 118 of the Copyright Act in order to permit expanded off-air taping of its programs in schools. ITVS has reported that some rights holders are unwilling even to negotiate, while others refuse to extend additional rights at reasonable rates.

Congress in the past has recognized the difficulties public television faces in operating in a free market setting. The House Judiciary Committee observed in 1976 that "public broadcasting may encounter problems not confronted by commercial broadcasting enterprises, due to such factors as the special nature of programming, repeated use of programs, and, of course, limited financial resources." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 117 (1976). The Committee also cited Congress's determination "that encouragement and support of noncommercial broadcasting is in the public interest" in concluding that the nature of public broadcasting warrants certain types of special treatment in the copyright area. Id. In recognition of the special circumstances of public television (and certain other noncommercial entities), Congress has granted various exemptions and licenses specifically applicable to public broadcasting and certain other noncommercial uses under the Copyright Act. See pages 10-11, supra.

The special problems public television faces in clearing rights will not disappear with the passage of time.

Thus, even if Congress should conclude that a regime of free-market negotiations would be preferable in the case of commercial uses, compulsory licenses would still be needed for noncommercial uses. At least for public television, the cable compulsory license should remain in place, and the satellite compulsory license (now set to expire at the end of 1999) should be extended for an indefinite period.¹⁷

Having these compulsory licenses in place for the long run will provide the certainty needed to permit public television to plan programming and negotiate business arrangements on a long-term basis, while continuing to ensure that rights holders receive appropriate compensation. Most importantly, it will help public television to fulfill its mission of providing its noncommercial educational programming services to all Americans using all communications technologies.

C. Major Changes in the Configurations of the Cable and Satellite Compulsory Licenses Are Not Needed at This Time.

The current configurations of the cable and satellite compulsory licenses appear appropriate in most respects.¹⁸ The compulsory licenses appear to have operated relatively smoothly, and parties have developed expectations based on the existing

¹⁷ Rates under the compulsory licenses should be reviewed periodically, as they are today.

¹⁸ As discussed in Part II, however, the satellite compulsory license should be expanded to permit additional retransmission of public television programming.

statutory and regulatory scheme. In these circumstances, the presumption should be against making significant changes. The existing compulsory licenses should be substantially modified only on a strong showing that such changes are needed.

The Notice inquires whether it would be feasible to combine the cable and satellite compulsory licenses into a single unified license applicable to all retransmission providers. Complete unification would be difficult in view of the different technologies and distribution patterns of different retransmission services. If some sort of unified license were created, it would need to be flexible enough to accommodate these differences. For example, it might be necessary to divide a unified license into different sections, each addressed to a different type of service.

The Notice also inquires whether royalty rates for cable and satellite should be equalized. Because cable and satellite services are different in many respects, it would be difficult to "equalize" rates applicable to the two services. It might be feasible to create uniform criteria that could be applied to establish the rates for both cable and satellite, as well as other retransmission services. The most obvious choice is a standard based on the fair market value of the copyrighted material, and it may be worth further study to determine the feasibility of such a standard.

However, Congress and the Copyright Office should move with caution in the area of rates. The cable rate system in particular is well established and rests on a substantial body of precedent on which parties have come to rely. The rate structure should not be changed in significant ways unless there is persuasive evidence that the current system is seriously deficient, for example, because existing rates make it difficult for some groups of retransmission providers to compete effectively.

There is one respect, referred to in the Notice, in which the current rate structure should be modified. In the past, there has been a significant disparity in the royalty fees applicable to retransmissions of network stations and superstations under the satellite compulsory license, with much lower fees assessed for retransmission of network station programming. This disparity should be eliminated.¹⁹

The primary issue raised by the Notice in connection with the satellite compulsory license relates to the so-called

¹⁹ Rates for satellite retransmissions were originally tied to the rates paid by cable systems for retransmissions. Even if (contrary to PBS's view) it originally was appropriate to incorporate in the satellite license the disparity in rates under the cable license, this approach would be no longer justified. The statute governing the satellite compulsory license has been amended to state that rates for both retransmission of network stations and retransmission of superstations are to be those that "most clearly represent the fair market value of secondary transmissions." 17 U.S.C. § 119(c)(3)(D). Evidence currently being presented to the Copyright Arbitration Royalty Panel in Docket No. 96-3, the Satellite Carrier Royalty Rate Adjustment Proceeding, shows that the values of network station programming and superstation programming are at least comparable and that the disparity in fees is thus inappropriate.

"white area restriction." As described below, PBS has proposed that the compulsory license scheme be expanded to authorize nationwide satellite retransmission of certain PBS programming. This proposal in effect would remove the white area restriction for such retransmissions. In view of the statutory goal of universal access to public television, as well as the need to clear rights to programming that DBS providers could use to meet their set-aside obligation under the 1992 Cable Act, removal of the white area restriction for the limited purpose of facilitating nationwide distribution of PBS programming is clearly appropriate.

The white area restriction should be retained in the case of distant retransmission of the signals of public television stations. Where a household has over-the-air access to a local public television station, importation of a distant public television signal creates a significant potential for injury to the local station due to confusion among viewers in the area that is difficult for public television, acting collectively, to address.²⁰

²⁰ The potential adverse effects on local public television stations are far less where the DBS service carries a national PBS feed, which does not purport to replicate the kind of program menu typically offered by a local public television station.

If localized retransmission via satellite becomes a reality at some point, Congress should consider removing the white area restriction as it applies to retransmission of the local public television station's signal in the station's local area. At this point, however, it appears premature to speculate

The Notice raises a number of other questions regarding the configurations of the existing compulsory licenses. As noted above, PBS's view is that the current configurations are appropriate for the most part. If Congress should conclude, however, that there is a need for significant revision, it should take care that access to public television is preserved and should attempt in particular to avoid changes that would decrease the incentives of cable and satellite providers to carry public television signals. In addition, in consideration of the limited financial resources of public television, Congress should avoid steps that would have the effect of reducing significantly the amount of royalties received by public television rights holders (many of which are PBS member stations).

If other interests dictate a compulsory license revision that would interfere with the ability of public television to reach a wide audience or otherwise fulfill its unique educational mission, Congress should consider creating an exemption that would protect public television. Alternatively, Congress could create a separate license applicable only to public television, rather than attempting to cover both commercial and noncommercial programming under the same regime. The important point is that the regulatory scheme should be structured in a way that takes into account the special circum-

about how such localized retransmission capabilities might affect the existing white area restriction.

stances of public television, including its unique mission to reach all Americans.

II. Compulsory Licenses for Public Broadcasting Should Be Expanded to Encompass Public Television Services Developed for Emerging Distribution Technologies.

Additional compulsory licensing is required for public broadcasting to ensure that public television program services are available to all Americans regardless of the technology used. In addition to the continuing emergence of the DBS industry as a major competitor to cable, alternative program delivery services such as wireless cable, open video systems ("OVS"), and the Internet offer opportunities for distribution of public television programming. To maximize services to the public and to fulfill its educational mission, public television continues to adapt its services and to develop new services to take advantage of the new and expanding technologies. For all of these technologies, there should be compulsory licenses to facilitate the public's access to public television programming services.²¹

A. Some Form of Compulsory License Is Needed to Ensure That Public Television Services Will Be Accessible Through Emerging Distribution Technologies.

Like the existing licenses for cable and satellite, compulsory licenses for emerging distribution technologies would promote efficient and broad dissemination of educational

²¹ PPS takes no position on whether such compulsory licenses should be extended to commercial broadcast programming.

programming, while also assuring appropriate compensation for rights holders. But in the public television context compulsory licenses are not only useful; they are the only realistic way to ensure that public television services will be accessible through new and expanding technologies. As described in Part I.B. above, public television faces special obstacles in negotiating for retransmission rights in a free-market setting. See pages 16-18, supra.

Even those with just a passing familiarity with the entertainment industry will understand why it is so difficult for PBS and its producers to clear the rights necessary to extend PBS's services to new media and means of distribution. Every program includes a number of separate elements, usually owned by differing interests. For example, there are rights in the script, in the music, in visual arts included in the program, in stock footage, in music composition, and in music recording. (Each program is also likely to include the contributions of actors, writers, directors, and musicians, all of which are governed by various collective bargaining agreements.) The vast majority of transactions engaged in by these underlying rights holders on a day-by-day basis are with commercial entities for commercial uses.

Underlying rights holders are often ambivalent about how to deal with noncommercial educational entities seeking to license their properties. They are accustomed and adept at

transacting business in a commercial marketplace, but have no incentive or need to consider the realities of public broadcasting producers, who are motivated to provide noncommercial educational programming services to the nation, not to maximize profits.

PBS and its member stations understand why commercial entities far prefer to negotiate licenses in the marketplace. The commercial marketplace provides perhaps the most efficient means of establishing the proper value of a property. However, public broadcasters, by definition, do not operate in a commercial marketplace. They are non-profit, educational institutions with a public service mission. Compulsory licenses are best suited to address just this kind of situation.

PBS and its member stations are working prodigiously to help the nation extend the benefits of the new technologies to education. In the absence of the underlying rights needed to extend broadcast programs to new media, however, PBS and the country will be stymied by PBS's inability to adapt its services for various uses by students in schools and other learners at their workplaces and in their homes. Without compulsory licenses, the rights necessary to deliver this vital educational content where it is most needed cannot be affordably obtained.

PBS recognizes that the interests of rights holders must be protected in order to encourage the continued creation of programming for television. Indeed, PBS works regularly with

program producers and represents their interests in various contexts; it is therefore particularly sensitive to the need of rights holders to preserve the value of their works and to receive reasonable compensation for them. However, it is also important to ensure public access to copyrighted works, particularly for educational purposes. A limited expansion of compulsory licenses directed specifically at enabling widespread distribution of public television programming through all appropriate technologies -- and subject to compensation for such distribution -- reflects an appropriate balance of the interests of rights holders, the viewing public, and the government.

Congress and the Copyright Office should consider several alternatives for organizing the compulsory license scheme to allow public television to offer new services. One option would be to expand the existing compulsory licenses to include additional public television services. For instance, Section 119 could be expanded to allow delivery of additional PBS services created for distribution through DBS. A similar procedure could be followed as compulsory licensing is considered for each new technology.

In the alternative, Congress could place compulsory licenses for noncommercial educational services in a separate section of the Copyright Act. This could be accomplished by expanding Section 118, which applies exclusively to public broadcasting, to include the distribution of public television

services by new technologies.²² In the past, Section 118 has provided an effective impetus for the negotiation of voluntary license agreements for the use by public broadcasting of a variety of materials. Over the long term, establishing separate compulsory license provisions for the distribution of public television services might avoid complications that could arise if public and commercial broadcasting were governed by the same provisions.²³

²² PBS's comments in this proceeding focus on retransmission of noncommercial educational broadcast services. There are, however, a number of additional issues related to Section 118 that should be considered by the Copyright Office and Congress in conjunction with any review of the compulsory license provisions of the Copyright Act. The types of works and permitted uses covered by Section 118 have not been updated since 1976.

PBS's views on expansion of the Section 118 compulsory license and on grant of a compulsory license that would permit use of public television archival material are set forth in testimony PBS and NPR presented to the House Subcommittee on Courts and Intellectual Property in February 1996. For instance, PBS believes that the Copyright Office should clarify the scope of, and Congress should expand, the compulsory license for use of musical works in transmissions by public television stations, conferred in Section 118(d). It is generally understood that reproductions may be used for performances or displays for a period of no more than seven days from the date of transmission. In many cases, the seven-day period has proved to be too short to allow teachers to work material into the curriculum. The period should be extended, so that PBS and program producers would be able to grant schools not less than a full year of "off-air record rights." This longer period would give teachers greater flexibility to work programs or program segments into the curriculum throughout the course of the school year.

²³ PBS anticipates that expansion of Section 118 would apply only to new uses. There appears to be no need to disrupt the existing cable and satellite compulsory licenses by removing retransmission of public television signals from their coverage. The various parties to agreements affected by those licenses have settled expectations that should not be disturbed.

The choice of the mechanism for creation of new compulsory licenses for public broadcasting may be affected by the resolution of the many other questions posed in the Notice of this proceeding. Further consideration of this matter should occur once some of these other questions are resolved. The fundamental point is that compulsory licenses that assure that noncommercial educational programming will be available to the American public through new and expanding technologies are critical to realizing Congress's goal of universal access to public television services.

B. A Compulsory License Should Be Provided for Distribution of Additional Public Television Services by Satellite.

PBS believes that the compulsory license scheme for distribution of public television services by satellite providers should be expanded in certain respects. Such expansion, whether through Section 119 or through a separate license directed to public television, will facilitate additional distribution of public television programming services and thereby advance Congress's goals of ensuring widespread access to public television and improving the nation's educational achievements.

1. PBS's National Satellite Service

In the last session of Congress PBS proposed legislation that would have expanded the satellite compulsory license to permit nationwide retransmission to DBS subscribers of the PBS

National Satellite Service.²⁴ Under the existing satellite compulsory license, a network broadcast signal may be retransmitted only to DBS subscribers in "unserved" households, i.e., households that cannot receive an over-the-air signal of grade B intensity of a primary network station affiliated with that network. See 17 U.S.C. § 119(a)(2)(B), (d)(10). The "unserved household" restriction with respect to DBS subscribers is anomalous as applied to the public television national feed in view of Congress's action to provide other satellite viewers with nationwide access to the public television national feed under 47 U.S.C. § 605(c).

The proposed amendment would permit PBS to offer a DBS provider a PBS satellite feed that could be retransmitted nationwide, while ensuring appropriate compensation for rights holders. As a result, both "served" and "unserved" households could obtain the PBS service from their DBS provider without the need for PBS to engage in costly and difficult renegotiations of existing program agreements. Under the proposed amendment, DBS providers would pay the same rate for the PBS national feed as

²⁴ A copy of the legislative proposal PBS presented in the fall of 1996 is attached hereto as Exhibit A (letter dated September 24, 1996, from PBS to Senate Judiciary Committee). This proposal discussed expansion of the Section 119 compulsory license but could be adapted for inclusion in a license provision specifically directed to public television services.

the rate applied to network station signals under 17 U.S.C. § 119.²⁵

As stated in the draft report language PBS supplied to the Senate Judiciary Committee last year, the purpose of the amendment is to carry out Congress's mandate to ensure that all citizens have access to basic public broadcasting service through all appropriate available telecommunications distribution technologies. A nationwide PBS/DBS service would ensure that every television household that subscribes to DBS retains ready access to public television.²⁶

In addition, as noted above (page 11 note 12), a recent court of appeals decision has affirmed the obligation of DBS providers under the 1992 Cable Act to set aside 4 to 7 percent of

²⁵ Payments received by PBS in connection with DBS carriage of the National Satellite Service feed would be distributed to program producers and to local public television stations, with the consent of producers, providing a much-needed source of revenue for public television. In addition, local stations would be protected from loss of revenues by steps public television is in a position to take collectively, such as redistribution of any national pledge dollars.

As a result of a series of compromises reached with various industry representatives, the 1996 PBS legislative proposal provided that the license expansion would sunset in 1999, consistent with the limitation on the current satellite compulsory license. However, as explained at pages 18-19 above, PBS believes that there is a long-term need for the satellite compulsory license as it applies to public television. Thus, PBS's strong preference is to eliminate the sunset limitation from the proposed legislation.

²⁶ In many cases, once a household subscribes to DBS service, it is effectively lost to the local public television station, which can be received only with an antenna -- oftentimes previously removed.

their capacity for noncommercial educational or informational programming. The FCC is now proceeding to develop regulations to implement that requirement.²⁷ DBS providers thus will soon need to make arrangements to acquire enough noncommercial educational programming to fill between 4 and 7 percent of their channel capacity and to make that programming available on a nationwide basis. By clearing nationwide DBS retransmission rights for public television programming, expansion of the satellite compulsory license will help ensure that DBS providers can comply with this statutory obligation and that additional noncommercial educational services will be available to the public.

PBS believes that compulsory licensing is the only realistic approach to clearing the necessary program rights for a national DBS service to both "served" and "unserved" households. As noted in Part I.B. above, PBS and several public television producers have attempted to clear rights for such a service through negotiation, but have encountered significant obstacles.

To illustrate the magnitude of these obstacles, consider that PBS distributes approximately 1,600 hours of original broadcast programming each year. Since PBS secures at least three years of broadcast rights, at any given time it has extant broadcast rights to approximately 5,000 hours of programming. Many of the contracts governing PBS programs were negoti-

²⁷ PBS and the Association of America's Public Television Stations are filing comments today in the FCC's DBS rulemaking docket, MM Docket No. 93-25.

ated years ago, prior to the advent of DBS and other new technologies. It is extremely burdensome for program producers to clear all of the necessary DBS rights retroactively. In some cases, it may not even be possible to locate the rights holders.

In addition, PBS and its producers are not yet even in a position to clear all DBS rights prospectively. To provide a single satellite feed of PBS's National Program Service, all underlying rights (talent, music, stock footage, etc.) with respect to each program must be cleared. Inevitably, legal "gray areas" have arisen in the process of sorting through the potential claims and counterclaims of unions, guilds and underlying rights holders under applicable agreements governing program production for public broadcasting. At a minimum, resolution of these issues may take several years, further delaying launch of a national PBS/DBS service.

In the end, clearing rights to the entire PBS program schedule, whether prospectively or retroactively, is virtually impossible. There are some individual programs, such as foreign co-productions, for which DBS rights simply cannot be obtained.

It is important that Congress move quickly to provide a compulsory license that would clear nationwide DBS rights to public broadcasting programs. Because the program "pipeline" is so long (two to three years from concept to contract to air date), further delay in enacting a compulsory license would

extend the launch date for a national PBS/DBS service even farther into the future.

PBS hopes that the proposed amendment can be enacted during the current session of Congress. The proposal is consistent with the long tradition of grants of exemptions and licenses for noncommercial educational broadcasters under the Copyright Act. In view of the unique nature and mission of public television, passage of the proposed amendment would not constitute a precedent for similar treatment of commercial programming.

2. Additional Public Television Programming

Congress should also consider extending the compulsory license scheme to permit DBS providers to engage in nationwide retransmission of PBS programming in addition to the National Satellite Service (e.g., instructional programs), as well as programming from other public television sources. There is a strong public interest in facilitating nationwide satellite distribution of a wide range of public television programming. Improving education is a top priority of national and state policymakers, parents, and businesses. DBS is a technology that could have an enormous impact in helping the nation reach its educational goals, helping ensure that every student and teacher will have convenient and affordable access to new and improved learning opportunities.

Public television has tremendous expertise in distance learning and extensive curriculum resources that could be made more accessible to millions of learners through DBS. Public television is the nation's number one source of classroom programming, reaching 30 million students in kindergarten through 12th grade and 1.8 million teachers in 70,000 schools. Public television is the world's leader in college telecourses; over 2.6 million adults have earned college credit through the PBS Adult Learning Service. PBS programs are the most widely used programming in a nationwide educational service sponsored by the cable industry entitled Cable in the Classroom. PBS also offers a diverse mix of children's programs, which have been designed as educational programs with specific learning objectives in mind.²⁸

Among the PBS services that teachers and students rely on every day are the following:

- PBS offers The Ready to Learn Service, an educational television programming service aimed at preschoolers.
- PBS distributes distance learning telecourses by satellite to two-thirds of the nation's college

²⁸ Educational consultants and child development specialists play an important role in the development of these programs. Preschool programs like SESAME STREET, MISTER ROGERS' NEIGHBORHOOD, LAMB CHOP'S PLAY ALONG and BARNEY AND FRIENDS help preschoolers prepare for school and formal learning by providing a greater awareness of letters and numbers and an introduction to social skills and ethics in group play settings. Such programs as READING RAINBOW, KRATT'S CREATURES, BILL NYE THE SCIENCE GUY, and WHERE IN THE WORLD IS CARMEN SANDIEGO? reinforce skills and information in literature, science, and geography for children ages 6 to 12.

campuses, where 400,000 adult learners are enrolled in courses provided by PBS.

- Since 1994, PBS has been providing to community colleges a service called "Going the Distance." Through that program, students can earn an Associate of Arts degree entirely through distance learning courses. PBS started with 40 colleges; now more than 100 colleges are participating.
- Three years ago PBS launched a video and online professional development training service for elementary and middle-school math teachers called PBS MATHLINE. More than 4,000 teachers are now enrolled in PBS MATHLINE, and a service for high school teachers is being created. PBS hopes to spread the concept across the curriculum, moving next to science with a service called PBS SCIENCELINE.

Access to these pioneering services could be extended significantly through DBS. Establishing a compulsory license to permit nationwide retransmission of this and similar programming would help ensure that DBS subscribers have access to the full range of important educational resources public television offers.

Clearance of rights through a compulsory license, subject to appropriate compensation for rights holders, will also help to fulfill Congress's goal of making DBS a significant distribution mechanism for noncommercial educational programming. To fulfill their obligation under the 1992 Cable Act to set aside 4 to 7 percent of their capacity for such programming, DBS providers should have the ability to retransmit nationwide more than a single PBS feed; they will need to obtain and retransmit additional programming provided by PBS and public television stations (as well as programming provided by other public

television program producers and educational institutions). Much of this programming cannot be retransmitted nationwide via DBS without costly and difficult rights clearances. Thus, expansion of the compulsory license scheme to facilitate the availability of this material to satellite providers is a crucial step in implementation of the DBS set-aside obligation. As in the case of cable (see pages 15-16 above), the compulsory license is an important complement to the carriage requirement.

3. Carriage Requirements

The Notice inquires whether must-carry requirements should be extended to the satellite compulsory license and the provision of local network signals. Until more information becomes available about the feasibility of localized retransmission capabilities for satellite carriers, PBS cannot offer specific proposals on this subject. The existing requirement that DBS providers set aside 4 to 7 percent of their channel capacity for carriage of noncommercial educational programming was enacted at a time when it appeared that DBS would be solely a national service. If localized retransmission on DBS becomes a reality, Congress and the FCC should consider requiring DBS systems to carry some or all local public television signals.²⁹ The nature of any such requirement would necessarily depend on the way in which the DBS industry and DBS technologies develop.

²⁹ This subject is discussed at greater length at pages 49 and 52-53 of the Comments of PBS and APTS in FCC MM Docket No. 93-25.

C. Compulsory Licenses for Retransmission of Public Television Programming Should Be Extended to New Retransmission Technologies.

While broadcast television, cable and satellite are the dominant communications media for most Americans, newer media such as the Internet are fast becoming central features of our society. If PBS and other public broadcasters cannot obtain rights to retransmit noncommercial programming via these new technologies in an efficient manner, significant paths of access to public television services will be lost. Compulsory licenses for public broadcasters to transmit and adapt public television programming should be extended to all new and emerging technologies. In particular, clarification and expansion of the rules concerning public broadcasters' use of their program material "online" is of critical importance to the future of public television.³⁰

The need for extension of compulsory licenses to new retransmission media and distribution technologies is not merely a problem for the future; rather, it is an immediate and urgent need. The inability to clear rights for use of material on the Internet is already limiting PBS's ability to disseminate programming effectively and the public's access to valuable educational materials. For example, PBS has placed on its

³⁰ The compulsory license PBS seeks for use of program material on the Internet could be structured like Section 118, which provides for a limited range of uses. PBS is not suggesting the creation of a global license for simultaneous retransmission of broadcast signals on the Internet.

Website material from a program on the history of rock and roll produced by WGBH, a Boston public television station, with the BBC. WGBH relied on the Section 118 compulsory license mechanism to clear broadcast rights to the music used in the program. However, because rights to this music -- even to segments -- cannot realistically be cleared for Internet retransmission, WGBH found it necessary to strip out the music before the material was placed on the Website. As a result, Internet users cannot access the most central feature of the program -- the music of rock and roll.

More broadly, extension of compulsory licenses for retransmission of noncommercial programming through the Internet and other new technologies is a crucial step toward maximizing opportunities for distribution of educational services. Both Congress and the Administration have made education a top priority and are strongly supporting the use of technology and telecommunications to achieve educational goals. This includes provision of incentives and financial support for schools to wire every classroom in the nation for Internet access. States are investing heavily in school computers, satellite dishes, and wide area and local area networks -- some with intranets. These new electronic platforms are designed to give teachers and students "on demand" access to learning resources, including video, text, graphics, and communication with experts.

Public television is the repository of a tremendous library of high quality programming. Although public television's existing broadcast programs are widely used by teachers and students in classrooms, there has been a growing demand from educators to "re-version" these programs to make them connect more directly to specific curriculum units and to make them available "on demand."

For example, teachers are eager to use public television's high quality programs, such as THE CIVIL WAR, programs on U.S. Presidents, and programs on the settling of the West. However, most teachers do not have time to use an entire 60-minute program in the classroom. Instead, they often are looking for a specific segment within a program that directly connects to their curriculum and that will provide their students with a focused learning experience. For example, in one of THE CIVIL WAR programs there may be a four-minute segment about the Emancipation Proclamation that is ideal for helping teachers discuss this pivotal event in our country's history. PBS may broadcast the 60-minute program in October, but a teacher may need just that four-minute segment to teach the Emancipation Proclamation in March. If PBS could deliver just that segment when needed, under authority of a compulsory copyright license, the usefulness and educational value of the segment would be significantly increased.

The Notice asks whether separate licenses are required for new retransmission technologies. In PBS's view, it is impossible to generalize about this matter. In some cases, a new technology may be sufficiently similar to cable or satellite that it could be included in an existing license. However, such determinations are likely to involve a case-by-case examination of the individual circumstances of each new technology.

Likewise, it is difficult to generalize about whether the Copyright Office may extend an existing compulsory license to a new retransmission provider or whether Congressional action is needed. In some cases the Copyright Office may be able to conclude that a new service is sufficiently similar to an existing service that it is covered by an existing license. For example, PBS and others have explained that retransmission by open video systems is properly covered by the existing cable compulsory license.³¹ On the other hand, the Internet is sufficiently different from cable and satellite that it would probably require congressional action to extend a compulsory license to retransmission of materials via the Internet. Again, the determination must be made on a case-by-case basis.

For each new broadcast retransmission service for which a compulsory license is provided, Congress should consider imposing some form of obligation to carry public television

³¹ See Reply Comments of the Public Broadcasting Service in Copyright Office Docket No. 96-2.

programming. As Congress recognized in connection with cable (see page 15, above), a compulsory license and a broadcast signal carriage requirement are complementary forms of regulation. In the case of public television, carriage requirements further Congress's goal of providing universal access to noncommercial educational services through all technologies.

The appropriate form of any carriage requirement necessarily would vary based on the characteristics of the retransmission technology in question. For example, a service that is offered on a local basis might be required to offer a certain number of local public television signals, while a service offered on a national basis might be subject to a different type of obligation, similar to the requirement that DBS providers set aside 4 to 7 percent of channel capacity for programming provided by certain categories of noncommercial entities. In addition, the number of signals to be carried must be tailored to the capacity of the service in question. A case-by-case examination will be needed in order to determine whether a carriage requirement is appropriate for a particular new technology and the form that requirement should take.

Conclusion

Consistent with the foregoing comments, the Copyright Office should recommend continuation of the existing compulsory licenses as they apply to the retransmission of public television services. The existing compulsory licenses have worked well for

Conclusion

Consistent with the foregoing comments, the Copyright Office should recommend continuation of the existing compulsory licenses as they apply to the retransmission of public television services. The existing compulsory licenses have worked well for the most part and do not require major revisions. If significant modifications are made, Congress should take steps to ensure that they do not impair the longstanding congressional interest in assuring universal access to noncommercial educational services. In addition, the compulsory license scheme should be expanded to cover the retransmission of public television programming through DBS and all other emerging technologies.

Respectfully submitted,

Paula A. Jameson / m.j.w.

Paula A. Jameson
Senior Vice President, General
Counsel, and Secretary
Gregory Ferenbach
Deputy General Counsel
Public Broadcasting Service
1320 Braddock Place
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April 28, 1997



September 24, 199⁶₇

Via Facsimile & Hand Delivery

Shawn M. Bentley, Esq.
Majority Counsel
United States Committee on
the Judiciary
224 Dirksen Senate Office Bldg.
Washington, DC 20510

Dear Shawn:

Attached is a final draft of the PBS/DBS amendment to H.R. 1861 for your consideration.

Although the proposed statutory language is essentially the same as PBS proposed last week, the draft Report language has been substantially revised to address comments and concerns of interested parties. PBS has included the comments of the Motion Picture Association of America, Inc. (MPAA), the Association of Local Television Stations (ALTV), which had previously objected to the PBS amendment, the Satellite Broadcasting and Communications Association (SBCA) and America's Public Television Stations (APTS), which serves as the Washington representative of our member stations. Please note that counsel to MPAA and ALTV were still awaiting one or two final "sign offs" on Report language as of late this afternoon. We do not expect any further changes to the statutory language, and we wanted to send it to you as soon as possible.

We have also been in touch with the National Association of Broadcasters (NAB) about our proposal and the staff has advised us that the NAB will remain neutral with respect to this matter. PBS believes, however, that the reasonable concerns of commercial broadcasters have now been addressed by the comments of ALTV and its counsel.

The PBS/DBS amendment therefore reflects input from the three industries with the most significant policy and business interests at stake -- program producers, commercial broadcasters and satellite service providers. PBS plans to continue to discuss the proposal with any other persons or groups that express interest in the PBS/DBS amendment, but we do not believe that other interests would be materially or adversely affected by this

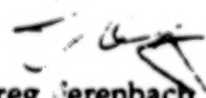
provision. For example, while ASCAP and BMI have made inquiries, the interest of ASCAP and BMI are simply not compromised here. Assuming that PBS does not already have the necessary music rights to offer a DBS service to served areas, under our proposal ASCAP and BMI retain the statutory right to participate in the satellite rate proceeding. In fact, their fair share of the satellite royalties attributable to this service can only be increased by the amendment. Similarly, while the cable industry has also made inquiries, the PBS/DBS Amendment does not affect cable's interests particularly since both cable and satellite now have an obligation to distribute non-commercial programming under current law.

Please note also that, while PBS sincerely appreciates the consideration shown to it by interested parties, the PBS/DBS amendment includes important concessions that PBS has made in the hope that this provision could be added to H.R. 1861 and acted upon in the current Congress.

Based upon our extensive discussions with the interested parties, PBS believes that the attached amendment constitutes a well-reasoned, non-controversial and important addition to H.R. 1861, and we urge the Committee to include it in the Chairman's mark-up at the Committee's meeting scheduled for Thursday of this week.

If you have any questions about the attached, please call me at (703) 739-5063, Paula Jameson at (703) 739-5056 or Joan Kutcher at (202) 662-5206.

Sincerely yours,


Greg Werenbach
Deputy General Counsel

Attachment

cc: Fritz Attaway, MPAA
Cynthia Merrifield, MPAA
Jim Popham, ALTV
Andy Paul, SBCA
Paula Jameson, PBS
Joan Kutcher, Covington & Burling
Marilyn Mohrman-Gillis, APTS

September 24, 1996

PBS/DBS Amendment to H.R. 1861

The Satellite Home Viewer Act of 1994 is amended as follows:

(1) Compulsory license to retransmit PBS national feed.

Subsection (a)(1) of section 119 is amended by inserting "and a Public Broadcasting Service Satellite Feed" after "Superstations" and by inserting "or by the Public Broadcasting Service satellite feed" after "superstation".

(2) Statutory rate. Subsection (b) of section 119 is amended as follows:

(i) in subparagraph A insert ", and listing the Public Broadcasting Service satellite feed if it was carried," after "signals were transmitted"; and

(ii) in subparagraph B, clause (ii) insert "and the number of subscribers receiving a secondary transmission of the Public Broadcasting Service satellite feed" after "transmission of a network station".

(3) Definition of Public Broadcasting Service satellite feed.

Subsection (d) of section 119 is amended by redesignating paragraphs (6) through (11) as (7) through (12) and adding after paragraph (5) a new paragraph as follows:

"(6) Public Broadcasting Service satellite feed. The term "Public Broadcasting Service satellite feed" means the national satellite feed distributed by the Public Broadcasting Service consisting of educational and informational programming intended for home use, to which it has obtained national terrestrial broadcast rights."

(4) Effective date. The amendment is effective as if included in the enactment of the Satellite Home Viewer Act of 1994, Pub. L. 103-369, and expires on December 31, 1999.

Draft report language on the PBS/DBS provision:

Section _____. This section would provide DBS providers with a compulsory license to redistribute the national satellite feed distributed by the Public Broadcasting Service. It would apply to educational and informational programming comprising the national satellite feed to which PBS currently has broadcast rights. The license would extend to all households in the United States including those in areas currently served by a local public television station, and would sunset in 1999.

Under this section, DBS providers would pay the same rate for the Public Broadcasting Service national feed as the rate applied to network stations as defined in Section 119. The Committee intends that, although the PBS national feed will not be at issue in the current satellite rate negotiations or the rate arbitration proceeding underway before the Copyright Office, the rate for network stations that results from that proceeding would be applied to the Public Broadcasting Service national satellite feed. Thus, the Committee would not expect the provision to interfere with the ongoing rate proceeding.

The compulsory license will allow PBS to offer its national programming services without time consuming renegotiations of existing program agreements. However, the Committee intends the sunset provision to encourage PBS to move quickly to clear rights for use by DBS providers prospectively, so that PBS could participate in market negotiations after 1999.

The Committee recognizes the unique mission and organizational structure of PBS and believes it is important to lower statutory barriers in order to support PBS's efforts to develop non-public revenue sources. Significant differences remain between commercial broadcast networks and the noncommercial PBS network, which call for different treatment of PBS under the compulsory license provided in Section 119. This provision follows in a long tradition of congressional grants of exemptions and privileges to noncommercial educational broadcasters, such as PBS, under the copyright law (e.g., Section 114(b) and Section 118(d) of this Title). It similarly is intended to carry out the Public Broadcasting Act's mandate to ensure that all citizens of the United States have access to this basic public broadcasting service through all appropriate available telecommunications distribution technologies.

Indeed, PBS is already required to provide programming services by satellite to home dish owners by 47 U.S.C. § 605(c), and this provision will enable PBS to provide the same programming services to users of other satellites.

At the same time the Committee continues to recognize the necessity of preserving the integrity of the copyright acquired through

marketplace negotiations by local commercial network affiliated television stations for distribution of national network programming within their service areas. Limiting the scope of the compulsory license for satellite retransmission of commercial network programming to homes that cannot receive that network from a local commercial station continues to be an essential feature and objective of Section 119. Thus, the committee in no way intends the extension of the compulsory license to the satellite retransmission of PBS programming into areas served by a local PBS station to serve as a precedent for similar treatment of commercial broadcast network or network affiliate programming by satellite providers. In this regard, a critical consideration in the Committee's inclusion of this modification of Section 119 is the support of PBS's member stations for this provision.

Finally, the Committee believes that the compulsory license granted in this section will serve as a mechanism for DBS providers to carry out their congressional mandate to set-aside 4% to 7% of their channel capacity for noncommercial programming of an educational or informational nature and the Committee intends that carriage of the PBS national feed could be used towards fulfilling this requirement. The Committee notes that this requirement was recently upheld by the United States Court of Appeals for the District of Columbia in Time Warner Entertainment Co. v. FCC, 1996 WL 491803 (D.C. Cir.).

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April 28, 1997

**GENERAL COUNSEL
OF COPYRIGHT**

APR 28 1997

RECEIVED**VIA MESSENGER**

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Office of General Counsel
Copyright Office
James Madison Memorial Building
First & Independence Avenues, S.E., Room LM-403
Washington, D.C. 20540

Re: Docket No. 97-1
Revision of Compulsory Licenses

Dear Ms. Petruzzelli:

Enclosed please find fifteen (15) copies of the Testimony of B.R. Phillips, III, Chief Executive Officer of our client, the National Rural Telecommunications Cooperative, in the above-captioned matter.

Should you have any questions, please feel free to contact the undersigned.

Sincerely,


Jack Richards

Enclosures

cc: B.R. Phillips, III
Steven T. Berman
R. Jay Downen
Joan E. Keiser

Comment Letter

RM 97-1

No. 29

GENERAL COUNSEL
OF COPYRIGHT

APR 28 1997

RECEIVED

Statement of

B.R. Phillips, III
Chief Executive Officer

National Rural
Telecommunications Cooperative

Before the
Copyright Office,
Library of Congress

Docket No. 97-1

Revision of the Cable and Satellite
Carrier Compulsory Licenses

April 28, 1997

Introduction

My name is Bob Phillips, and I am the Chief Executive Officer of the National Rural Telecommunications Cooperative (NRTC). On behalf of NRTC's members and affiliates serving rural America, I have come today to explain how the current satellite carrier compulsory license frustrates consumer choice and competition in the video programming market. As you are aware, one of the primary goals of the Copyrights Act is to encourage distribution of copyrighted material. Certain key provisions of the current copyright law, however, run counter to this purpose by confusing and disenfranchising consumers. The current law is unworkable. It has frustrated copyright holders, satellite carriers and distributors, and most importantly -- consumers. Problems with the copyright laws also impede competition in the delivery of video programming, which is a critical public policy goal. The Copyright Office has a unique opportunity to recommend legislative solutions to correct these problems.

NRTC is a not-for-profit cooperative made up of nearly 800 rural electric and telephone utilities, and affiliated organizations located throughout 48 states. Our primary mission is to ensure that the benefits of modern telecommunications technology are extended to rural Americans. NRTC's first major effort toward fulfilling its goal was the creation in 1987 of Rural TV®, a package of 85 channels of television programming provided to homes equipped with C-band satellite receiving dishes. Nearly 200 of NRTC's members deliver Rural TV® services to more than 70,000 homes. In 1993, NRTC entered into an agreement with DIRECTV to launch the first high-powered Direct Broadcast Satellite (DBS) service. NRTC members and affiliates invested more than \$100 million to capitalize the launch of the first DBS service in America and in return received distribution rights for DIRECTV programming in specific regions of the

country. Just three years after project launch, these NRTC members and affiliates already provide local service to more than 570,000 subscribers in rural America, representing nearly 25 percent of DIRECTV's total subscribership nationwide.

NRTC and its members and affiliates have a keen interest in ensuring that copyright law facilitates the wide distribution of copyrighted material via satellite throughout rural America. We are committed to our local communities and dedicated to ensuring that rural consumers are not disenfranchised by copyright laws.

Congress has repeatedly called for competition in the provision of video services to consumers: first by enacting the Satellite Home Viewer Act of 1988 (renewed and amended in 1994), second by enacting the Cable Television Consumer Protection and Competition Act of 1992, and, most recently, by enacting the Telecommunications Act of 1996. All three of these laws created new, competitive markets for telecommunications services. One of their common purposes is to ensure that established competitors do not exercise undue market power over new entrants.

Compulsory copyright licenses for video programmers should not benefit one competitive technology or supplier over another. They should be balanced. Compulsory licenses need not be technology neutral but should recognize the inherent differences between various types of video distribution systems. Statutory licenses should not handicap differing, competing technologies and providers.

Our recommended changes in the satellite compulsory license are set forth below. They will bring about more competition in the provision of video programming, will ensure fair compensation to copyright owners, and will encourage wide public dissemination of copyrighted works.

This written statement makes the following recommendations:

- The "white area" problem must be fixed. The current rules are unworkable and should be eliminated.
 - The satellite carrier compulsory license should be made permanent.
 - Satellite carriers should not be required to pay higher royalty fees than cable operators for the same programming.
 - The satellite and cable compulsory licenses should remain separate.
1. **The White Area Problem Must be Fixed. The Rules are Unworkable and Must be Eliminated.**

While a robust and growing industry, DBS has not yet reached true competition with cable. According to the FCC's 1996 Annual Report on the status of competition in video programming markets,¹ cable subscribership was 89% or 62.1 million of all multichannel video programming distribution (MVPD) subscribers in 1995². In contrast, the entire DBS industry has 4.9 million subscribers.

¹ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket. No. 96-133, Third Annual Report ("1996 Report").

² 1996 Report, ¶4.

The "white area" rules have caused a tremendous uproar among DBS consumers. The rules are impossible to administer and impossible for consumers to understand. They stand in the way of true consumer choice and contravene the stated Congressional goal of competition in video markets. The rules are flawed and must be eliminated.

We believe consumers could be given as much freedom as possible to make their own choices in selecting sources for video programming, without adversely impacting the rights of local broadcasters. Where copyright law intersects with the provision of programming to consumers, the law should balance the rights and responsibilities of local broadcasters and satellite carriers, with the consumers' best interests ultimately in mind.

Consumers should have the right to purchase distant network signals from a satellite carrier or distributor, and local broadcasters could be appropriately compensated for distant network signals sold to consumers within their Grade B contours. The current white area rules are particularly burdensome in rural areas where Grade B contour lines often do not match signal propagation characteristics of local network stations. This creates artificial barriers for consumers who should be allowed to purchase the signals.

"Grade B signal intensity" has no meaning to consumers. Consumers cannot easily and cheaply measure Grade B reception, and it often has little or no bearing on whether the signal received is acceptable to any given consumer. Indeed, even local broadcasters and satellite

distributors have disagreed on how to test a signal and what constitutes an "acceptable" Grade B intensity signal.

Elimination of the white area rules would resolve a great deal of consumers' current confusion. No longer would consumers ask: "What is a Grade B intensity signal? How do I find out if I receive such a signal? Why should my local broadcaster prevent me from buying a distant signal when I can't receive an acceptable local signal? Why can my satellite provider sell me sports from a distant city but not a network signal?"

Broadcasters currently have an almost untrammelled right to challenge the provision of distant network signals by satellite carriers. Consumers, however, have little or no recourse if broadcaster challenges are not made in a spirit of cooperation and good faith. While some broadcasters work with consumers (granting waivers, working on local solutions regarding antennas, etc.), others bully consumers whose only interest is to receive an acceptable network signal.

We know that many consumers would prefer to receive local network signals. In many cases, however, DBS offers a more cost-effective, convenient solution -- with a higher quality signal than is available over-the-air.

Local broadcasters are the established providers of local signals in their markets. DBS providers are the new entrants. If copyright law is to follow Congressional intent in removing

barriers to competition, then the local incumbent provider must bear the burden of competition. Elimination of all white area restrictions, coupled with an appropriate surcharge within the Grade B contour, would better enable the satellite industry to compete in the provision of information and entertainment programming and would serve the needs of consumers. The current competitive imbalance could be improved through the use of a surcharge without financially damaging local broadcasters. A properly formulated surcharge could present a classic "win/win" situation: broadcasters would not necessarily lose revenues related to distribution of distant network signals delivered in their local areas; consumers would get expanded choice; and Congressional goals for competition would be met.

Because white area rules have been so confusing, consumers currently purchasing distant network signals from satellite carriers and distributors should be permitted to continue purchasing the signals. There is no reason for consumers to be broadly tainted by illegality as a result of flawed, incomprehensible rules.

NRTC submits that digital broadcasting technology presents yet another reason why white area rules should be eliminated. Digital over-the-air broadcast signals do not have the signal propagation characteristics of analog broadcasts. A digital receiver is able to pick up either a clear signal or no signal. There is no "gray area." Any consumer who has access to digital receiving equipment will know immediately whether he or she can receive a digital over-the-air signal. If not, the consumer should have the right to purchase a distant network signal.

2. The Satellite Carrier Compulsory License Should be Made Permanent.

Currently, the cable compulsory license is permanent, while the satellite license operates under a de-facto 5-year sunset. The satellite license was first enacted in 1988 and was set to expire in 1993. Congress renewed the license in the 1994 amendments to the Satellite Home Viewer Act and again set another 5-year expiration date.

The 5-year expiration cycle of the SHVA is also a competitive impediment to further penetration of satellite into the home viewing market. It forces the satellite industry to spend significant amounts of time, money and energy every few years asking Congress for an extension, and it forces Congress into an arbitrary and unnecessary review cycle.

NRTC recommends that the satellite carrier license be extended indefinitely. An indefinite extension of the satellite license would better enable the satellite industry to compete with the cable industry, without interfering with cable's license. Such a change would ensure that copyright law is competitively neutral with regard to video program distribution and would foster competition without interfering with the rights of copyright owners to fair compensation for their product.

3. Satellite Carriers Should Not be Required to Pay Higher Royalty Fees than Cable Operators for the Same Programming.

Royalty fees paid by satellite carriers and cable interests vary in part due to a difference inherent in the way the fees are calculated. Cable fees are calculated under Section 111 based on

the gross receipts of a given cable system. In contrast, satellite carrier fees are calculated under Section 119 based on a per subscriber per month formula. Such differences reflect the existence of two separate licenses and two differing technologies for video programming distribution. However, the difference in the methodologies for calculating royalty fees set forth in Sections 111 and 119 results in an artificial competitive advantage for cable.

According to the Satellite Broadcasting and Communications Association (SBCA), which noted these disparities in its direct case before the Copyright Royalty Tribunal³, when the "gross receipts" fees of the largest MSOs are compared on a per subscriber basis to the fees paid by satellite carriers, cable pays less. This is inherently unfair and does not serve the public interest.

The FCC remarks that the number of mergers, acquisitions, and exchanges between MSOs increased from 64 in 1994 to 128 in 1995⁴. With the increased aggregation and merger of cable interests, we believe that the disparity between the royalty fees paid by satellite and cable interests will continue to grow.

As stated previously, competition in video programming markets is a well known goal of federal policy. Copyright law should have the same goal, in addition to protecting intellectual property rights and broadly disseminating copyrighted works. We recommend that some

³ See Testimony of Dr. John Haring, Tr. 3084 (April 10, 1997), *Adjustment of Rates for the Satellite Carrier Compulsory License*, Docket 96-3 CARP SRA, 62 Fed. Reg. 9212 (February 28, 1997).

⁴ *Id.* at ¶33.

mechanism be found to ensure that the marketplace effects of royalties calculated under the compulsory licenses are competitively neutral.

Another reason why satellite carriers typically pay higher royalty fees under current law is that satellite fees increase faster over time. The cable license is permanent. Satellite royalty fees, however, must be negotiated and arbitrated under a de facto 5-year schedule, following complex negotiation and arbitration processes. Satellite royalty fees historically have not increased in a smooth curve. Rather, they have jumped precipitously as a result of negotiation and arbitration. The amount cable pays rises only with increases in gross receipts based on statutory rates initially set by law in 1976.

It is unreasonable for one segment of the video programming industry to have its rate formulas imbedded in a permanent compulsory license (cable), while the other segment (satellite) is subject to the market pressures of negotiation and arbitration on a statutorily mandated schedule. The certainty of the cable formula provides an artificial competitive advantage embedded in federal copyright law.

4. The Satellite and Cable Compulsory Licenses Should Remain Separate.

Cable and satellite are different technologies, providing different services to consumers. For instance, cable systems are terrestrially based and deliver a mix of local and national programming in strictly local markets. Satellite systems deliver programming on a national basis from satellites whose footprints cover the entire continental United States. Satellite systems

deliver an expanded, different mix of programming than most cable systems. Two separate copyright licenses are required.

Currently, no satellite carrier retransmits local programming. Although proponents of such a scheme promise much, it is difficult to see, given the current DBS orbital assignments, how retransmission of local signals by satellite will necessitate "harmonization" of cable and satellite licenses. Current satellite carriers and distributors simply do not perform the same local functions as cable. Indeed, in rural areas, there is often no local cable system.

NRTC and its members do not see the need for harmonization of the licenses. Our satellite offerings are not cable offerings and should not be governed as such. NRTC should not have to operate under the same rules as cable companies.

Conclusion

NRTC, its members and affiliates, appreciate the opportunity to submit testimony on the issues raised by the Copyright Office. We believe revisions to the current copyright laws for satellite carriage are desperately needed to further the goals of the Copyrights Act. The white area restrictions are unnecessary and should be eliminated. Local broadcasters should be fairly compensated for the importation of distant signals via satellite by the imposition of an appropriate surcharge on satellite carriers. The temporary satellite compulsory license should be made permanent. The royalty fees paid by satellite carriers and cable operators should be comparable, but the licenses should remain separate.

We believe our recommendations are consistent with the goals of copyright law to fairly compensate copyright holders, and to encourage the wide distribution of copyrighted works. These changes also will promote competition in the market for video programming, all of which will result in more choices for consumers.

Document Letter
RM 97-1
No. 30

Before the
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Washington, D.C.

**GENERAL COUNSEL
OF COPYRIGHT**

APR 28 1997

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**TESTIMONY OF
JAMES J. POPHAM
VICE PRESIDENT, GENERAL COUNSEL
THE ASSOCIATION OF LOCAL TELEVISION STATIONS, INC.**

In the matter of

**Revision of the Cable and
Satellite Carrier Compulsory Licenses**

Docket No. 97-1

April 28, 1997

• INTRODUCTION

The following testimony is submitted on behalf of the Association of Local Television Stations, Inc. ("ALTV"), in response to the Copyright Office's *Notice of Public Meetings and Request for Comments* in the above-captioned proceeding.¹ ALTV is a non-profit, incorporated association of broadcast television stations unaffiliated with the ABC, CBS, or NBC television networks. Local stations among ALTV's members include not only traditional independent stations, but also local television stations affiliated with the three emerging networks, Fox, UPN, and WB.²

ALTV welcomes and appreciates the opportunity to address the burgeoning array of complex issues arising from the current reexamination of the cable and satellite carrier compulsory licenses. ALTV recognizes that the Copyright Office and all interested parties are taking only the first step down what inevitably will be a tortuous -- and, probably, often torturous -- path towards legislation reforming the compulsory licenses for secondary transmissions of the signals of local television stations. Thus, at this early stage of the legislative process, ALTV wishes to focus on major considerations which should govern the debate over the plethora of detailed issues confronting the Congress. Whereas the core concerns and concepts elucidated today have a timeless lustre, the details are devilish and the technology is dynamic. Who would have thought even a year ago that Echostar would be standing on the brink of a merger with ASkyB -- and promising to deliver local television signals to 80 per cent of the nation's television homes? Thus, everyone is confronted with a new and unexpected array of issues and a need to mesh those issues into the debate over already controversial and perplexing issues. Again, one must confront the complexities of providing network service to unserved areas, but now in the context of DBS's

¹ 62 Fed. Reg. 13396 (March 20, 1997) [hereinafter cited as *Notice*].

² As used herein, the term "local television stations" includes ALTV member stations, but excludes affiliates of ABC, CBS, and NBC.

providing local signals, but not in all markets. In this regard, ALTV understands, but regrets, the limited amount of time all parties have had to consider these issues. Nonetheless, ALTV will offer its best thinking on the issues, but reserving the privilege of providing even more detailed and enlightened views as the legislative process proceeds.

- **SUMMARY**

ALTV favors maintenance of a compulsory license mechanism for simultaneous secondary transmissions of the signals of broadcast television stations by multichannel video providers. Under the compulsory license regime urged by ALTV, a multichannel video provider could retransmit the signals of *local* television stations in their home markets *gratis*, provided the multichannel video provider retransmitted *all* television stations in the market to all subscribers in the market. The local market area of a local television station should conform to the area in which the station may elect to be carried as a must carry signal under the FCC's rules, regulations, and authorizations. To avoid needless inconsistencies, any multichannel video provider which retransmitted a complement of broadcast signals which, if carried by a cable system serving the same subscriber, complied with the cable television must carry rules, would be presumed to be carrying all local television stations. The compulsory license also would apply to retransmission of a limited number of distant signals.

The basic premise of ALTV's approach is the distinction between a multichannel video provider which functions as a nondiscriminatory conduit for the signals of local television stations and a multichannel video provider which selects and exploits only certain stations in assembling its array of services. The former, unlike the latter, is not disrupting the existing marketplace. ALTV also has premised its position on the valid public interest in maintaining the availability of a limited number of distant signals. While distant signals have become considerably less significant in terms

of generating demand for multichannel video services, the public has come to rely on the availability of a few superstations and other "distant" stations from proximate markets.

The compulsory license should not extend to secondary transmission of any program which would infringe the exclusive exhibition rights of a local television station with respect to either its network or non-network programming. Similarly, any secondary transmission of a program which would not be permitted by the applicable rules and regulations of the FCC regarding network or syndicated program exclusivity or sports black-outs should fall outside the scope of the compulsory license. Furthermore, the compulsory license should not apply to secondary transmission of a distant network-affiliated station in any area already served by an affiliate of the same network. The current prohibitions on program alteration and commercial substitution also should be maintained.

Lastly, fees for secondary transmissions of distant stations should be uniform for all multichannel video providers, regardless of distribution medium. No fee should be charged for local signals. A step-up in fees should be maintained for distant signals in excess of those permitted under the FCC's former distant signal limitations.

- **A COMPULSORY LICENSE FOR SECONDARY TRANSMISSION OF BROADCAST SIGNALS BY MULTICHANNEL VIDEO PROVIDERS SHOULD BE MAINTAINED.**

ALTV submits that the compulsory license remains a proper mechanism for enabling multichannel video providers to retransmit the signals of local television stations. Generally speaking, the cable compulsory license, now embodied in section 111 of the Copyright Act and complemented by FCC rules and regulations governing broadcast signal carriage by cable television systems, should serve as the model for extension of a compulsory license to other multichannel video providers. Not every element of the license necessarily should be identical, but

the basic licensing scheme in Section 111 should be carried forward to other multichannel video providers.

ALTV would limit the compulsory license to known video distribution technologies, including cable television, MMDS ("wireless cable"), open video systems, SMATV, DBS, and other satellite-to-home carriers. ALTV specifically would exclude Internet-based video distribution, which from today's perspective appears to function very differently from the multichannel video providers enumerated above.³

Nonetheless, a compulsory license should be available for secondary transmissions of the signals of local television stations by existing multichannel video providers. First, the current cable compulsory license has worked well. Indeed, when measured against the goals it was designed to achieve, the cable compulsory license has been a remarkable success.⁴ Those goals are well-known.

The purpose of this regulatory structure is to facilitate the exploitation of copyrighted materials by removing the prohibitive transaction costs that would attend direct negotiations between cable operators and copyright holders, while at the same time assuring copyright holders compensation for the use of their property.⁵

³As MPAA President Jack Valenti urged during the last Congressional review of the compulsory licenses (albeit with respect to an interim license pending repeal), the compulsory license should "apply to competing delivery systems whose market characteristics are similar to cable." Letter to the Honorable William Hughes from Jack Valenti, February 4, 1992, at 2.

⁴The best argument for repeal of the compulsory licenses may be that they never should have been enacted in the first place. However, this is like saying that cable operators ought to be common carriers, providing non-discriminatory access to all video programmers. Putting the genie back in the bottle or putting Humpty Dumpty back together again hardly recreates the world in which the genie never came out of the bottle or Humpty Dumpty never fell off the wall. The compulsory license has been assimilated into the video marketplace -- and that marketplace has changed dramatically since 1976. No way exists to turn back the clock and start from "Go" again!

⁵*NBC v. CRT*, 848 F. 2d 1289 (D.C. Cir. 1988).

Since the compulsory license became effective in 1978, cable television has been able to provide its subscribers with a variety of local and distant broadcast signals undeterred by uncertainty or elaborate and expensive processes for licensing of broadcast signals and programming. Primed by its use of local and distant broadcast signals, the flow of programming options from cable systems -- which now includes over one hundred cable networks -- reaches over 60 per cent of television households. At the same time, the number of local television stations has grown, as has the number of broadcast television networks. Meanwhile, hundreds of millions of dollars in royalties have been distributed to copyright owners of programming on local television stations. Furthermore, with the growth of cable has come an expansion in the market for original and syndicated television programming -- a development which redounds to the benefit of program producers and copyright owners. As a result, consumers in this country now are veritably awash in a sea of new and increasingly diverse program choices. The cable compulsory license, therefore, has played a seminal role in stimulating creation, distribution, and exhibition of video programming, thereby serving the fundamental goals of copyright.

Whereas broadcasters were wary of the compulsory license 25 years ago, they have grown to appreciate that when subject to appropriate limits (now primarily in the form of complementary FCC rules and regulations), the compulsory license mechanism has served the interests of not only copyright owners, broadcasters, and cable operators, but also the viewing public.⁶ Thus, for example, the free use of local television signals under the cable compulsory license, when accompanied by the current must carry/retransmission consent regime, has preserved the ability of local television stations to reach their intended audiences. Similarly, fears that unrestrained use of

⁶The bulk of local stations' concerns about the compulsory license have arisen in the wake of changes in the FCC rules and regulations which were designed to complement the compulsory license. The decade of the 80s saw the FCC and the courts eliminate the FCC's distant signal limitations, the syndicated exclusivity rules, and the must carry rules. Now, however, the syndicated exclusivity rules and the must carry rules have been reinstated. These developments have buoyed ALTV's confidence that the compulsory license for cable can be maintained and, with appropriate safeguards, extended to other multichannel video providers.

distant signals would place stations in the line of friendly fire have not materialized. FCC rules permit stations to protect their exclusive licenses to exhibit syndicated and network programs in their markets. Additionally, the number of distant signals typically imported into local markets has been limited, initially by the FCC's direct limitations on the number of permissible distant signals, and subsequent to their repeal, by the 3.75 per cent compulsory license fee for retransmission of distant signals in excess of those permitted under the FCC's rules. Given the soundness of the compulsory licensing scheme for cable and provided similar limitations remain as core elements of a compulsory license scheme, ALTV urges application of a similar compulsory license regime to other multichannel video providers, including satellite carriers.

Second, extending a compulsory license to other multichannel video providers would promote badly needed competition among multichannel video providers. Cable television now enjoys enormous market power and a clear edge over other existing and emerging multichannel video providers. Extending the compulsory license (or conforming the existing compulsory license in the case of satellite carriers) would maintain competitive parity *vis-a-vis* the use of broadcast television signals by competing multichannel video providers. On the other hand, denying new multichannel video providers access to local broadcast station signals on the same basis would raise the ante for new competition and entrench cable more deeply.⁷ Inasmuch as communications policy makers have dreamed of the day when cable was subject to genuine competition from competing multichannel video providers, providing similar access to the compulsory license would serve national communications policy.

⁷Because broadcast television programming continues to be the most popular programming provided by cable systems, the inability to secure access to such programming on comparable terms would impair the ability of an emerging competitor to compete head-on with cable. For example, Sky (ASkyB/Echostar) considers it essential to gain access to local television signals in order to compete directly with cable.

Additional competition in the form of new multichannel video providers also would be beneficial in terms of the goals of copyright by further expanding the market for new and existing works and thereby stimulating their production, distribution, and exhibition to the public. Again, copyright owners would enjoy not only the royalties collected under the compulsory license, but also the revenue from the additional use of existing programming and the production and use of new programming. In short, both national competition and copyright goals would be advanced by extension of the cable compulsory license to other multichannel video providers.

Third, the compulsory licenses have caused no material harm to copyright owners. As noted above, copyright owners have received millions upon millions of dollars in royalty distributions. These revenues were designed to and effectively have compensated copyright owners for use of their programming by cable television systems. Furthermore, any harm is more than offset by the expansion of the market for new programming and for additional uses of existing programming. With respect to harm, ALTV hardly may fail to point out that parties attempting to quantify harm to their interests attributable to the compulsory license have met with a notable lack of success. For example, the Copyright Arbitration Royalty Panels and their predecessor agency, the Copyright Royalty Tribunal, have been unable to quantify the harm alleged by parties to the distribution proceedings. As recently observed in the Copyright Office's recommendations concerning the 1990-92 royalty distribution:

The Tribunal was not itself consistent in application of the harm criterion, and never quantified the value of a "harm credit." The Panel in this proceeding took full account of the harm criterion -- i.e., acted on the basis of it -- and concluded, consistent with its authority to make distribution determinations, that the criterion was not useful to deciding distribution percentages.⁸

Even before the recent decline in superstation carriage by cable systems, the United States District Court in Chicago, in a case involving attempts by the National Basketball Association to limit the number of Chicago Bulls games on superstation WGN found that:

⁸*Distribution Order*, Docket No. 94-3 CARP CD -90-92, 61 *Fed. Reg.* 55653, 55659 (October 28, 1996).

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The NBA produced no credible evidence, statistical or anecdotal, to suggest that superstation broadcasts of the Bulls, the Hawks, or the Nets on WGN, WTBS, and WWOR, steal viewers away from any other team's local broadcasts or limit the number of games the teams have been able to sell in their local markets...[N]o data showing any adverse effect on local ratings ever was introduced.⁹

Similarly, complaints from Major League Baseball that distant carriage of sports events dilutes the audience for and thereby discourages broadcast of local sporting events have no substance. The availability of a Cubs-Cardinals game in Baltimore or a Braves-Pirates game in Houston hardly draws a significant audience away from the local telecasts of the Orioles and the Yankees in Baltimore or the Astros and the Padres in Houston. The number of viewers watching an imported game typically comprises less than one per cent of the local audience. Moreover, dilution of local game audiences would occur only if those viewers watching the Cubs-Cardinals game, for example, would otherwise have watched the local Astros-Padres game. ALTV is aware of no evidence to support the hypothesis that viewers of imported game telecasts would watch the local team's game telecasts if no superstation game telecasts were available. Finally, with respect to harm alleged by sports interests, sports leagues do collect substantial royalties for distant signal carriage of league games. This revenue may be subject to revenue sharing among teams, such that local teams are compensated for any perceived harm from importation of distant games. Some teams which have been carried on superstations also have paid substantial sums to the leagues pursuant to special arrangements involving superstation telecasts of their schedules. These arrangements only confirm and illustrate how the compulsory license has been assimilated into the market and perceived harms mitigated by private negotiations.

Fourth, abandoning the compulsory license remains impractical and unwise. For those who continue to long for a true marketplace, ALTV must say that no such true marketplace ever could exist. No one can argue seriously that every individual cable system could clear rights to every broadcast program shown on stations carried by the system. A true marketplace would involve

⁹*Chicago Professional Sports Limited Partnership and WGN v. National Basketball Association*, 754 F. Supp. 1336 (1991) [subsequent history omitted.].

thousands or even millions of transactions. The demand for efficiency in this process -- notably the same demand which engendered the compulsory license -- would prompt creation of some private collective mechanism for licensing. Many have referred to the music licensing societies as examples of the sort of mechanism which might develop. However, such history has shown such collective licensing mechanisms to be antitrust time bombs which may tend to undermine competition and the true marketplace sought by those who disfavor continuation or extension of the compulsory license. Indeed, the long history of contention and litigation over broadcast music licensing suggests that transaction costs would be ongoing and substantial. The proffered benefits of a private licensing mechanism, therefore, are illusory.

Fifth, one might seriously question whether wholesale changes in the laws governing secondary transmissions of broadcast station signals would be worth the effort. Cable's reliance on distant signals appears to be diminishing. WWOR no longer is a superstation, and WTBS is in the process of converting to a pure cable network. Otherwise, distant signal carriage largely will be the province of proximate regional carriage of some strong local stations.¹⁰ Whereas satellite carriers do provide several superstation signals to their subscribers, this, too, may tend to diminish. Sky, for example, is focusing on providing local signals to its subscribers. The demands on capacity may be expected to reduce superstation carriage. Additionally, as today's superstations become tomorrow's network affiliates, their carriage will be limited to unserved areas. Given to declining use of distant signals, the issue of copyright liability has lost the near towering dimension that it had acquired 25 years ago. In such circumstances, the investment of time and resources necessary to establish a new private licensing scheme would be misplaced.

¹⁰Some might suggest that the declining number of superstations would ease the transition out of a compulsory license to full copyright liability. However, other major (formerly independent) stations are retransmitted extensively on a regional basis by many cable systems.

Sixth, elimination of the compulsory licenses would cause harm to consumers. With respect to local signals, local television stations would be faced with clearing local cable rights to all their programming.¹¹ Whereas ALTV is relatively confident that most local stations could reach satisfactory agreements with most program suppliers for local programming, ALTV is less than sanguine that licensing agreements could be reached with some sports copyright owners for distant signal carriage. The professional sports leagues enjoy an antitrust exemption which enables them to exercise tight control over broadcast rights to league games. Thus, even though individual teams may be copyright owners of their game telecasts, they are subject to league rules which rigidly control their abilities to license telecast rights to their games.¹² Such restrictive practices, when coupled with the historical animosity of sports interests towards the compulsory license and superstation broadcasts, create enormous concern that stations (and multichannel video providers) would be unable to secure exhibition rights to some attractive sports programming. Adding to this concern is the development of regional sports channels available only via cable and other multichannel video providers, which have gobbled up exhibition rights to local sports telecasts. This has been a catalyst for the shift of games away from free television to subscription services. Elimination of the compulsory license would tend to facilitate this trend, contrary to the interests of television viewers.¹³

¹¹Transaction costs for retransmission consent are very modest in comparison, involving at most one negotiation per cable system.

¹²See *Chicago Professional Sports Limited Partnership v. NBA*, *supra*.

¹³As one Commissioner of Baseball so aptly put it:

[Y]ou have to think about the problem I would have if we were able to reduce the number of Cubs games on the superstation. The political furor would be substantial.

Testimony of Francis D. Vincent, Jr., before the Copyright Royalty Tribunal, Docket No. CRT 91-2-89CD (October 1, 1991) at 1738.

Similarly, in this regard, cable systems and other multichannel video providers may not be the willing buyers essential to a licensing negotiation. They may wish to be selective in licensing of local programming, taking only certain programs, cherry-picking stations, and compiling their own channels. As a result, subscribers to cable and other multichannel video providers may lose access to the complete program schedules of their local stations.¹⁴ This would undo what Congress -- with the recent blessing of the Supreme Court -- has done in requiring cable systems to carry local television station signals.

- **THE SCOPE OF ANY COMPULSORY LICENSE FOR MULTICHANNEL VIDEO PROVIDER SHOULD BE LIMITED.**

The scope of the compulsory license ought be limited in several respects to assure that secondary transmission of broadcast signals never becomes a vehicle for destruction of local broadcast television service. Currently, the primary means of assuring that the cable compulsory license poses no threat to the economic viability of local television stations is a complementary array of FCC rules and regulations. In essence, the scope of the compulsory license is defined by FCC rules. Even the compulsory license mechanism itself, by mandating adjustment of compulsory license fees in the event the FCC rules are modified, assures that the compulsory license places local television stations in no material jeopardy.

Under the satellite compulsory license, concerns about effects on broadcast service -- and, in particular, the network-affiliate relationship -- are addressed directly. The satellite compulsory does not extend to secondary transmissions of affiliate station signals into areas already served by a local affiliate of the same network. Additionally, rates for superstation carriage depend on whether a superstation broadcasts programming which infringes the exclusive local exhibition rights of

¹⁴That stations lack bargaining power in negotiating with cable systems has been demonstrated in retransmission consent negotiations in which stations rarely if ever have been able to secure cash compensation for retransmission rights.

stations in markets into which the superstation is imported. Satellite carriers must pay more for superstations which broadcast such programming. Those which do not -- the so-called "syndex proof" superstations -- are subject to a lower rate. Thus, the satellite license differs from the cable license with respect to the means of preserving the rights and economic well-being of local television stations. What is significant, however, is the recognition under both mechanisms that local television stations and their service to the public ought not be placed in jeopardy by a compulsory license.

Concern for the vitality of local television stations, even within the four corners of a copyright compulsory license, is perfectly appropriate, and, indeed, necessary. From the perspective of copyright owners of video programming, and the copyright law which protects their private interests for the public good, maintaining a thriving local television industry and promoting development of new broadcast networks also must be a compelling consideration. Broadcast stations and networks remain the major buyers of new and syndicated programming. They continue to provide the major economic incentive to create new programming through substantial demand for new programming and through creating a substantial after market for such programming via extensive reliance on syndicated programming. Weakening this market would put a heavy damper on the creation and production of new, diverse programming for all media.

Limitations which serve to preserve the vitality of the market for original broadcast programming remain an essential element of any compulsory license scheme. First, the compulsory license should extend only to secondary transmission of local station signals within their local markets only if all stations in that particular market are carried. A cable system which complies with the must carry rules should be considered as carrying all local stations. By the same token, a satellite carrier or other multichannel video provider providing a selection of local signals which, if carried by a cable system serving the same subscriber would satisfy the must carry requirements, also would be considered as carrying all local signals. Notably, this condition would

not force satellite carriers to carry all local signals in all local markets. They would retain the discretion (in light of capacity concerns) to forego local signal carriage altogether in any market.

This is a reasonable condition of securing the benefits of a compulsory license. As the Supreme Court recently acknowledged, the inability of a local station to reach its local audience is a virtual death sentence for the station.¹⁵ Those multichannel video providers which rely on local station signals as integral elements of their channel offerings should gain the benefits of a compulsory license only if they do so in a manner which is harmless to local television stations and the market they create for new programming. Furthermore, if multichannel video providers are functioning essentially as "antennas" for local signals, then like antennas, they should serve as an unrestricted conduit for every signal local to the market. On the other hand, if they are using only certain signals as their own product for viewers, then they deserve no compulsory license.

Second, the number of distant signals which may be secondarily transmitted under the compulsory license should be limited. Such a limitation may continue to be imposed indirectly via a fee schedule which reflects the current step-up in fees for cable carriage of signals in excess of those permitted under the FCC's pre-1980 distant signal limitations. Again, whereas ALTV recognizes the need to maintain availability of distant signals to which consumers have grown accustomed, no reason exists to expand the scope of the compulsory license. Limitations on the

¹⁵ALTV recognizes that satellite carriers now serve only a small proportion of television households and, therefore, for the time being pose only a marginal threat to any station which they fail to carry in its local market. However, the satellite carriers are in the business to expand. They hope to attract not only noncable households, but also cable subscribers. Indeed, they would hope to supplant cable as the home's multichannel video provider. One easily may anticipate the day when nearly all television households are served by a multichannel video provider, most likely cable or DBS. Together, they will serve the vast majority of television households, and each will have a sufficient share of the market, such that if either of them fail to carry some local stations, the station's viability would be threatened. At the very least, the station would be placed at a severe competitive disadvantage not only against its local broadcast competitors, but also against the competing multichannel video providers! One might also note historically that the FCC readily imposed must carry requirements on cable systems long before cable achieved a degree of market penetration which was meaningful in most markets.

number of those signals remains necessary to attenuate harm to local television stations and maintain the incentive for multichannel video providers to focus on development of new and diverse forms of programming. In any event, to the extent that multichannel video providers wish to make more elaborate uses of distant signals, they ought enter the marketplace.

Third, the compulsory license should not apply to secondary transmission of any program which would infringe the exclusive exhibition rights of a local television station to its network or syndicated programming. The preservation of the contractual exclusivity right of local television stations already is assured by the FCC's rules applicable to cable and open video systems, and satellite carriers currently may not carry a distant network affiliate into the area served by a local affiliate of the same network. The dictates of competitive parity, to say nothing of maintaining the basic integrity of the exclusive rights granted copyright licensees, mandate that all multichannel video providers play by the same rules and protect the syndicated and network exclusivity rights of local television stations. Compliance with such requirements no longer may be considered technically impossible even for DBS and other satellite providers.

Fourth, as is now the case under the satellite and cable compulsory licenses, the compulsory license should exclude signals subject to program alteration or commercial substitution by a multichannel video provider. Such practices extend beyond a mere secondary transmission and are inimical to the interests of the station carried, local stations, and copyright owners. As such, this limitation on the compulsory license should remain beyond controversy.

Finally, the compulsory license should extend only to secondary transmission of local television station signals in a manner consistent with any applicable rules, regulations, or authorizations of the FCC. This not only preserves the ability of the FCC to deal with signal carriage practices as communications policy issues, but also assures the compulsory license never becomes a means of carrying signals in violation of the FCC's rules.

- **NO FEES SHOULD BE CHARGED FOR SECONDARY TRANSMISSION OF LOCAL SIGNALS IN THEIR HOME MARKETS.**

Secondary transmission of the signals of local television stations in their home markets should incur no liability on a multichannel video provider provided the multichannel video provider is in compliance with all requirements respecting the secondary transmission of local signals. First, many signals are retransmitted locally pursuant to the FCC's must carry rules. No multichannel video provider should be forced to pay for signals which the law requires that it carry. Second, copyright owners are unharmed by local retransmission of broadcast station signals in their home markets. Third, to the extent a multichannel video provider simply serves as a conduit for all local signals, it should not be required to pay for use of the signals. On the other hand, if a multichannel video provider selects among local signals and excludes some local signals, it should be entitled to no compulsory license, much less a free compulsory license, for use of local signals.

- **DISTANT SIGNAL FEES SHOULD BE SIMILAR FOR ALL MULTICHANNEL VIDEO PROVIDERS PROVIDED A STEP-UP IS MAINTAINED FOR EXCESS SIGNALS.**

ALTV recognizes that fee schedules may be structured in numerous ways and that fee levels also may be determined by a variety of processes. For the moment, however, ALTV advances two broad considerations which ought remain integral structural elements of any compulsory license distant signal fees. First, all multichannel video providers should pay the same rate for distant signals. Competitive parity in the case of distant signal fees is just and should be offensive to no one.

Second, fees for excess distant signals should continue to reflect a substantial premium. Excess distant signals are those distant signals which could not have been provided to a subscriber in an area where a cable system could not have provided the signal under the FCC's distant signal

limitations. The step-up ratio should be adequate to provide the same disincentive to excess carriage which now exists under the cable compulsory license.¹⁶

- **THE LOCAL MARKET OF A LOCAL TELEVISION STATION SHOULD BE DEFINED BY THE FCC'S RULES DEFINING THE LOCAL MARKET OF A TELEVISION STATION FOR MUST CARRY PURPOSES.**

The copyright and communications laws ought operate in lock-step in terms of defining the local market of a local television station. At present, little difference exists. The FCC uses a definition based on a station's Arbitron Area of Dominant Influence ("ADI"). Because Arbitron no longer provides television market and ratings data, the FCC will shift to the Nielsen "Designated Market Area" in the year 2000. The Copyright Office, following the revision to Section 111 in the 1994 Satellite Home Viewer Act, will use the same definition used by the Commission. The shift to the ADI/DMA concept has enjoyed widespread support and is reflected in the current must carry statute. No basis exists to reinvent that wheel. Therefore, a compulsory license for secondary transmissions of broadcast signals should follow the same approach.¹⁷

- **CONCLUSION**

In view of the above, ALTV posits that compulsory license mechanism applicable to all multichannel video providers and modeled on the current cable compulsory license will best serve the interests of local television stations, copyright owners, and the public. Furthermore, parity

¹⁶NCTA complained loudly that the stepped-up 3.75% rate for post-*Malrite* distant distant signals "restored the barrier once imposed by the FCC on the carriage of more than a limited number of distant signals." *National Cable Television Association v. Copyright Royalty Tribunal*, 724 F. 2d 176, 184 (D.C. Cir. 1983).

¹⁷Use of the FCC local market area definition as the basis for the general definition of the local market, however, should not obscure the need to maintain a service area concept for determining white areas for purposes of satellite distribution of network signals.

among competing users of the signals of local television stations will promote competition, again, much to the benefit of copyright owners. Therefore, ALTV urges the Copyright Office to recommend legislation embodying a compulsory license for multichannel video providers which provides for free use of local signals when all local signals are carried and also provides for secondary transmission of a limited number of distant signals.

ALTV, again, appreciates this opportunity to address these issues and looks forward to the continuing debate and discussion of these significant issues.

ORIGINAL

**Before the
U.S. COPYRIGHT OFFICE
Washington, D.C.**

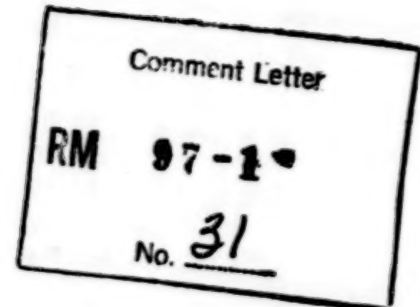
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In the Matter of)
Revision of the Cable and Satellite)
Carrier Compulsory Licenses)

Docket No. 97-1



**COMMENTS OF
UNITED VIDEO SATELLITE GROUP, INC.,
UVTV AND SUPERSTAR SATELLITE ENTERTAINMENT**

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April 28, 1997

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**Before the
U.S. COPYRIGHT OFFICE
Washington, D.C.**

In the Matter of)	
)	
Revision of the Cable and Satellite)	Docket No. 97-1
Carrier Compulsory Licenses)	

**COMMENTS OF
UNITED VIDEO SATELLITE GROUP, INC.,
UVTV AND SUPERSTAR SATELLITE ENTERTAINMENT**

The United Video Satellite Group, Inc. ("UVSG"), through its UVTV and Superstar Satellite Entertainment divisions, respectfully submits these comments in response to the Copyright Office's March 18, 1997, Notice in the above-referenced proceeding. UVTV is a satellite carrier program service provider which transmits via satellite independent television stations WGN, Chicago; WPIX, New York; KTLA, Los Angeles; FM radio station WFMT, Chicago; Network Services; and other programming to cable television and other local distributors, such as SMATV and MMDS operators. UVTV services, which are provided pursuant to the cable compulsory license and the carrier exemption in Section 111 of the Copyright Act, reach more than 40 million homes nationally. Superstar Satellite Entertainment, which operates under Section 119 of the Act, provides various programming services, including television broadcast signals, to the home satellite dish ("HSD") market.

I. INTRODUCTION

UVSG welcomes the opportunity to participate in this process and to provide the Copyright Office with input for the Office's consideration in its review and analysis of the compulsory licenses. This proceeding is of critical importance, not only to the companies involved, but even more significantly to television viewers throughout the United States. These compulsory licenses are particularly critical for the underserved areas of rural America.

There is a definite need for *both* the cable and satellite compulsory licenses. The licenses provide essential market clearing functions that benefit, not only cable operators and consumers, but television stations and copyright owners as well. Continuation of the compulsory licenses is vital to facilitate market transactions that ensure broad distribution of programming, and provide fair payment to copyright owners.

Although there have been significant changes in the program distribution industry since the original cable and satellite compulsory licenses were established in 1976 and 1988, respectively, the market and regulatory environment have evolved into an effective distribution system in conjunction with the compulsory licenses. It is critical that nothing undermine the current efficient and successful program distribution process, which would result in a significant loss of viewing choices for millions of television viewers.

Although the cable and satellite compulsory licenses continue to fulfill their basic purposes, UVSG believes that the functioning of these licenses could be improved

through several changes. First, the satellite license should be extended and made permanent -- neither license should have a sunset provision. In addition, the royalty adjustment mechanism and the arbitration process should be revised substantially from the vague standards and costly procedures which have resulted in rate fluctuations and rate increases in license fees.¹

II. THERE IS A DEFINITE NEED TO CONTINUE BOTH THE CABLE AND SATELLITE COMPULSORY LICENSES

When established by the Copyright Act of 1976, and the Satellite Home Viewer Act of 1988, the compulsory licenses had the dual goals of ensuring that artistic works, specifically television programs, were broadly available to the public, and that copyright owners were fairly compensated for that programming. These original goals of the cable and satellite compulsory licenses are *still* valid and are *still* being met. In reviewing the effects of current copyright law, there is one clear, unassailable fact: U.S. television viewers today are clearly benefiting from the compulsory licenses.

The laws and regulations shaping cable and HSD copyright and program distribution have been regularly modified to stay reasonably current with marketplace developments. For example, in 1990 the FCC's syndicated exclusivity rules were reintroduced and network nonduplication rules were expanded. These rule changes increased the ability of program copyright owners and local broadcast stations to protect contractually-

¹ See Comments of SBCA.

acquired local exclusivity of programs. Thus, copyright owners not only receive compensation under the compulsory license, but also maintain control over their programming. The market and regulatory environment have adjusted to the compulsory licenses which have worked *as intended* and must be allowed to continue to serve the American public.

III. CONTINUATION OF THE COMPULSORY LICENSES IS VITAL

The cable and satellite compulsory licenses must be continued to permanently assure a fair copyright payment system for copyright holders, while also assuring a wider choice of programming for the American public. A permanent license is necessary because of the long-term nature of television programming contracts. When buying programming, it is beneficial for buyers and sellers to lock in programming rights for a term of more than just several years. In addition, investment in new program distribution technologies is expensive and requires long-term planning, financing and commitment.

A. The Current Scope of the Compulsory License

In 1996, over 14,000 U. S. cable systems filed a Copyright Statement of Account in compliance with compulsory license regulations. In addition to the 63.9 million cable households these cable systems serve, approximately 12 million additional homes are served by C-band HSD, direct broadcast satellite (DBS), SMATV and MMDS (wireless cable) operators, who also make distant signals available. In addition, the compulsory license enables local broadcasters, both commercial and educational, to provide their product via

strong off-air signals or via microwave to areas directly adjacent to their markets -- allowing regional viewers to see local and regional news and entertainment programming especially geared to the region. The compulsory license currently allows 516 local broadcast stations to be seen as distant signals reaching 172.5 million consumers (see Exhibit 1).

B. Distant Signals And Superstations Are Important to Consumers

Superstations and other broadcast stations carried outside the fringes of their markets are highly popular viewing choices and consumers want to keep them as viewing options. Nielsen ratings and other independent surveys continually confirm that superstations are highly viewed programming alternatives.

Nearly 173 million Americans currently enjoy a wide variety of programming thanks to the compulsory license system. Interestingly, 31.8% of all local broadcast stations in the U. S. are available as distant signals. Included in this diverse station group are over 1,500 local broadcast stations televised regionally via a strong off-air or by microwave carrier and a number of national/regional satellite-delivered network affiliates and superstations such as WGN, TBS, WPIX, KTLA and WSBK. Because of the strong viewer demand, the average cable household now receives 2.9 distant signals.

In fact, cable subscribers rank the most popular superstations as some of the channels they would "miss most" if they were no longer available (see Exhibit 2). WGN, TBS and WPIX remain viewing options that 65 - 75% of cable viewers choose to watch

regularly (see Exhibit 3). Careful scheduling of movies, series, children's programming and specials, as well as local, regional and national news, all combine with live sporting events to keep superstations popular viewing choices for Americans everywhere.

C. Program Choice

Superstations provide the American public with unique program choices as well as alternative times to view their favorite programming. And the public takes advantage of these viewing choices and alternatives (see Exhibit 4). Month after month and year after year, the superstations have ranked higher than most cable networks in viewership and are included in Nielsen rankings of the most highly viewed cable options. These high viewership ratings are quite consistent throughout the year and throughout all dayparts. In other words, viewership is driven by the entire programming schedule, not just one programming type or segment. The American viewer votes every time the television is turned on. And the votes are clearly in favor of superstations and regional distant signals.

D. The Compulsory License Assures Urban Ties For Rural America

The value of the compulsory license is most evident in outlying urban areas and in rural America. The compulsory license system originated as a result of the public's need for programming choice and time diversity. These needs still exist and are met by the compulsory license, which continues to perform important unifying, informing and entertaining functions for all regions of the country. Currently, over 26% of cable subscribers do not receive a full complement of local television signals. In other words, 16.7 million

Americans reside in *underserved* markets. Underserved markets are (defined as households receiving *fewer than* three local broadcast networks, one independent broadcast station and one educational broadcast station.

Distant signals, provided via the compulsory license, are a perfect way to help bring these households up to "full complement". In this way, the compulsory license helps maintain a *minimum national standard* of access to broadcast stations. These imported stations also often provide locally focused original programming that informs and educates a regional audience about educational, cultural and civic events -- events not covered by any national cable programming entity.

For example, superstation WGN's commitment to locally produced news also allows viewers across the country a unique Midwestern perspective on regional, national and international news events. Viewer access to programming concerning community affairs, local/regional events, education, government, sporting events, crime, employment and health care helps to regionalize communities by offering them a broader perspective of the world. Without the compulsory license, these perspectives would not be available to many Americans.

IV. THE MARKETPLACE HAS ADAPTED SUCCESSFULLY AND COPYRIGHT HOLDERS ARE FULLY PROTECTED

A. Syndicated And Network Programming

Existing copyright law and FCC regulations protect copyright owners and assure the ability to control distribution and sell programming on an exclusive basis. Copyright holders of syndicated programming, as well as networks, can negotiate for market exclusivity, syndicated exclusivity and/or network non-duplication agreements for any or all of their programming. Market exclusivity guarantees a specific program can be aired only by one local broadcaster in a given market. Syndex and network non-duplication can guarantee that a cable system cannot import a program into such an 'exclusive' market.

Cable subscribers, through cable operators, generate substantial revenues for copyright holders of programs utilizing the current copyright payment system. Over \$2.1 billion has been paid to copyright holders by cable operators since the first cable compulsory license payments were made in 1978. In 1996 alone, cable systems paid approximately \$171.8 million into copyright coffers through the compulsory licenses.

The license also limits superstation distribution with severe financial penalties for carriage of more than the FCC's previously mandated maximum distant signal limit - penalties that result in higher compulsory license payments to copyright holders. Cable systems that wish to meet the needs and demands of their subscribers for more superstations can do so at the very substantial financial penalty of 3.75% of their gross revenues (on all

tiers on which broadcast stations appear). The growth of superstations is further limited under the retransmission consent provisions of the 1992 Cable Act, which require that cable operators and other distributors obtain express consent from the originating station prior to retransmitting a superstation (except for the limited number of such stations in existence on May 1, 1991).

B. Sports Programming

Over the years, a great deal of attention has been focused on superstation carriage of professional sports, with the argument sometimes expounded that superstation carriage somehow hurts the professional leagues and their teams.

In fact, superstation coverage of professional sports is a small percentage of the total television coverage made available to the American public. Moreover, the total number of games on four of the largest superstations (TBS, WGN, WPIX and KTLA) has actually declined over the years. In 1990, these superstations showed 504 NBA and MLB games. In 1997, they will air an estimated 383 games. However, sports interests have been adept at expanding sports programming on television.

It is clear that the compulsory license does not thwart new avenues by which leagues can receive new revenues from existing games. Despite the proliferation of sports on television, the leagues have continued to create new sports packages and have been able to find buyers for these massive new expensive game packages - the popularity of which may

even be enhanced by the superstation and other broadcast and cable game packages already available in the marketplace.

Sports leagues and teams are protected by antitrust exemptions, the FCC's sports blackout rules, their own league rules, and their ability to select which station in a market will be permitted to broadcast the games. For example, the leagues control when a team may televise its games locally, and use this control to guarantee exclusivity for games carried by cable sports networks, such as ESPN, and other networks.

Sports rights holders, like other copyright holders, are often compensated more than once for their product delivered by superstations. Broadcast stations pay rights holders local carriage fees. Substantial additional fees are also paid by individual teams to the leagues as compensation for superstation delivery outside the local market. Sports interests are then paid *again* for the same product under both the cable and satellite compulsory licenses.

V. EDUCATIONAL BROADCASTERS BENEFIT FROM EXTENDED COVERAGE

Local broadcast stations carried outside of their local market areas also benefit from extended coverage. In the case of educational television, which operates primarily on public contributions, the loss of extended coverage could result in a direct decline in contributions. Approximately 18.3 million households nationwide receive at least one distant educational television station via the compulsory license system. With federal government

funding of arts and education taking a lesser role, it is important to the financial health of educational stations to keep access to as many potential volunteer donors as possible.

VI THE COPYRIGHT EXCHANGE FUNCTION

Without the compulsory licenses, the distribution of broadcast programming would be seriously disrupted. As a nationwide system for copyright licensing and royalty fee collection, the compulsory licenses provides an orderly system which processes a huge volume of programming contracts and payments without requiring the time, expertise and expense of individual cable system/program supplier agreements. There is simply no private market alternative to the compulsory license.

VII RECOMMENDED AMENDMENTS TO THE HOME SATELLITE DISH COMPULSORY LICENSE

UVSG believes the current satellite compulsory license would be improved by the following changes.

1. Section 119 of the Copyright Act should be amended to establish a permanent license for satellite carriers serving the HSD market. A permanent license is necessary to maintain the significant benefits described above and also to provide for orderly business relationships in the program distribution process. This is particularly relevant for rural consumers who receive broadcast signals through HSD service and should not be second-class citizens to those who are located in urban markets or are served by cable television.

2. The current HSD arbitration process and standards should be revised to improve the effectiveness of the license and eliminate the costs and uncertainty involved in the arbitration. In order to insure reasonable rates for consumers, clearly articulated standards should be established for rate adjustments. In addition, reasonable limitations should be placed on any copyright fee increases resulting from the arbitration process.

VIII. CONCLUSION

In conclusion, UVSG believes that the cable and satellite compulsory licenses continue to be a vital part of the television program distribution process. UVSG believes that the compulsory licenses benefit all parties involved, including consumers, copyright owners, cable operators, satellite carriers and other distributors.

Submitted by:



Raymond J. Duffy
Senior Vice President
UVT
7140 South Lewis Ave.
Tulsa, OK 74136-5422

Dated: April 28, 1997

Consumers Receive All Types Of Broadcast Television Stations Via The Compulsory License

112
Educational
Stations
Reaching
18.3 Million
Consumers

264
Network
Stations
Reaching
23.9 Million
Consumers

140
Independent
Stations
Reaching
107.4 Million
Consumers



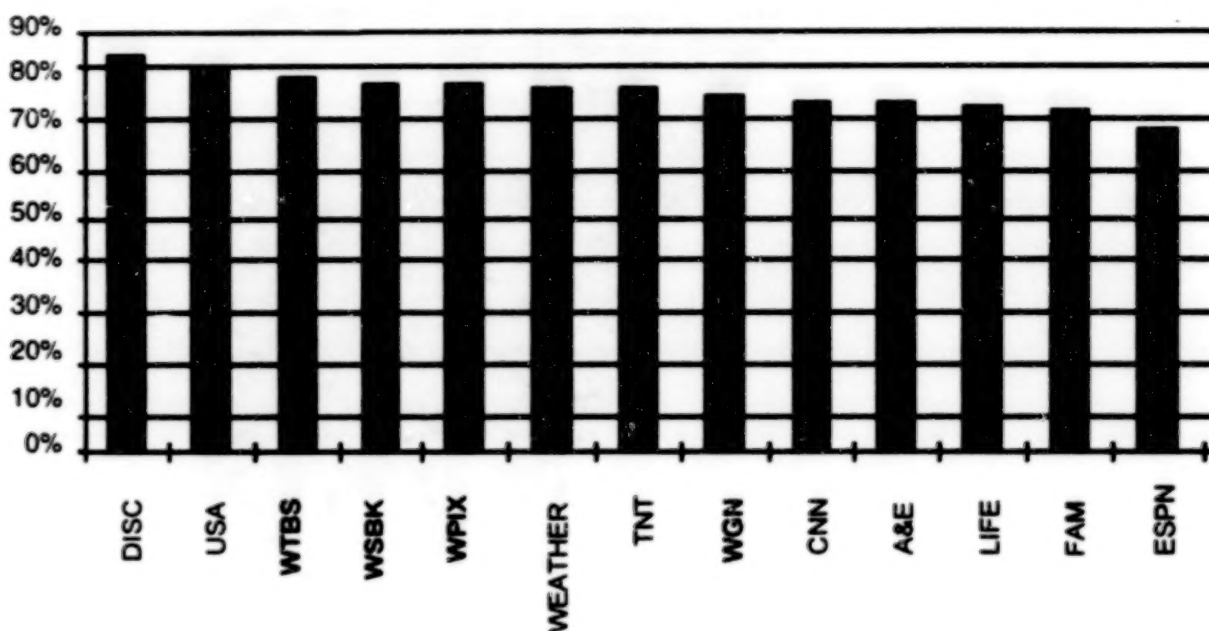
Affiliation	Distant Stations	%	Consumers (000)	%	HH (000)	%	Cable Systems	%
Network	264	51.16%	23,944	13.88%	8,868	13.88%	590	4.03%
Independent	140	27.13%	107,470	62.29%	39,804	62.29%	1,466	10.02%
Educational	112	21.71%	18,333	10.63%	6,790	10.63%	400	2.73%
Unspecified			22,782	13.20%	8,438	13.21%	12,180	83.22%
Total	516	100%	172,529	100%	63,900	100%	14,636	100%

Source: * Distant Stations = Cable Data 95-1 Form 3 Statement of Accounts.
Consumer Estimates - 1990 Census Data Based On 2.7 Persons Per Households.
UUTV Programming Dept. 4/97



Viewers Rate Superstations In Top Ten

**They Would Miss Most If Not
Available On Their Channel Line-up**



Network	Percentage
DISCOVERY	85%
USA	82%
WTBS	80%
WSBK	79%
WPIX	79%
WEATHER	78%
TNT	78%
WGN	76%
CNN	75%
A&E	75%
LIFE	74%
FAMILY	73%
ESPN	69%

Source: 1996 Market Facts National Cable TV Usage and Attitude Study

UPTV Programming Dept. 4/97

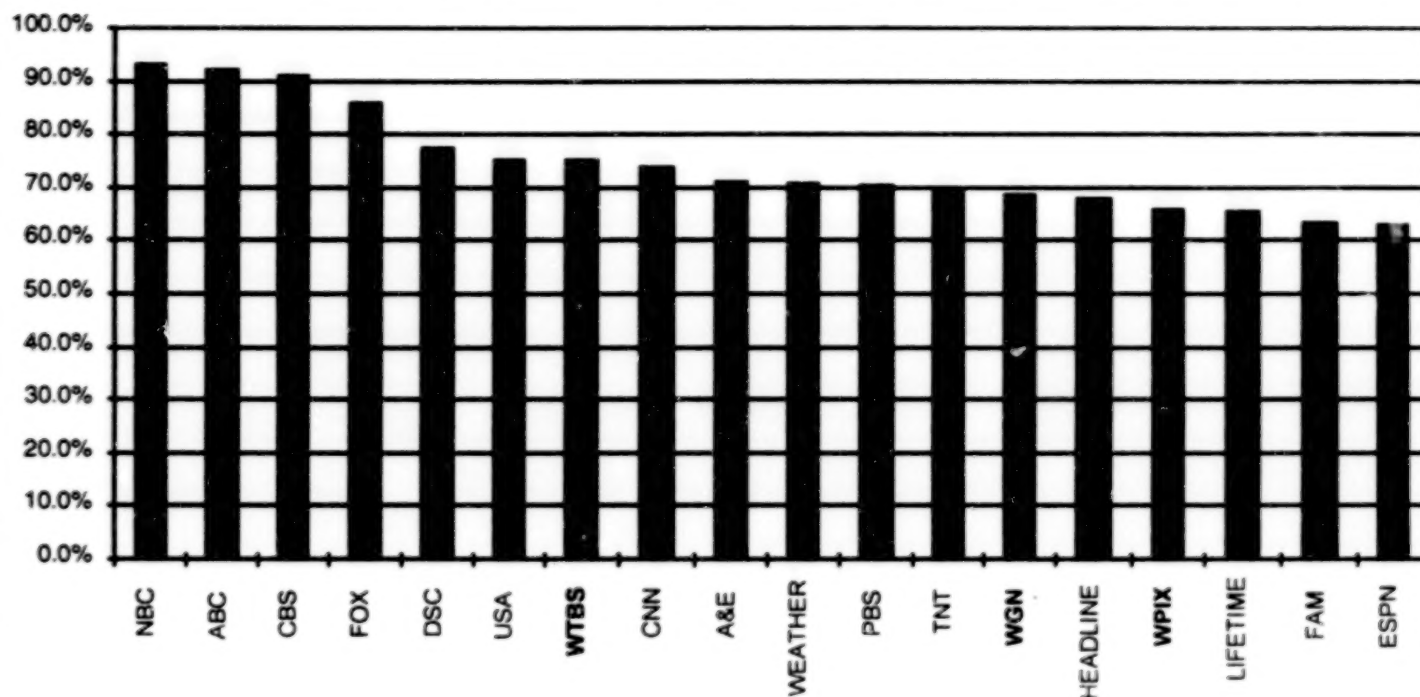
694



BEST COPY AVAILABLE

Consumers Stop To Watch Superstations!

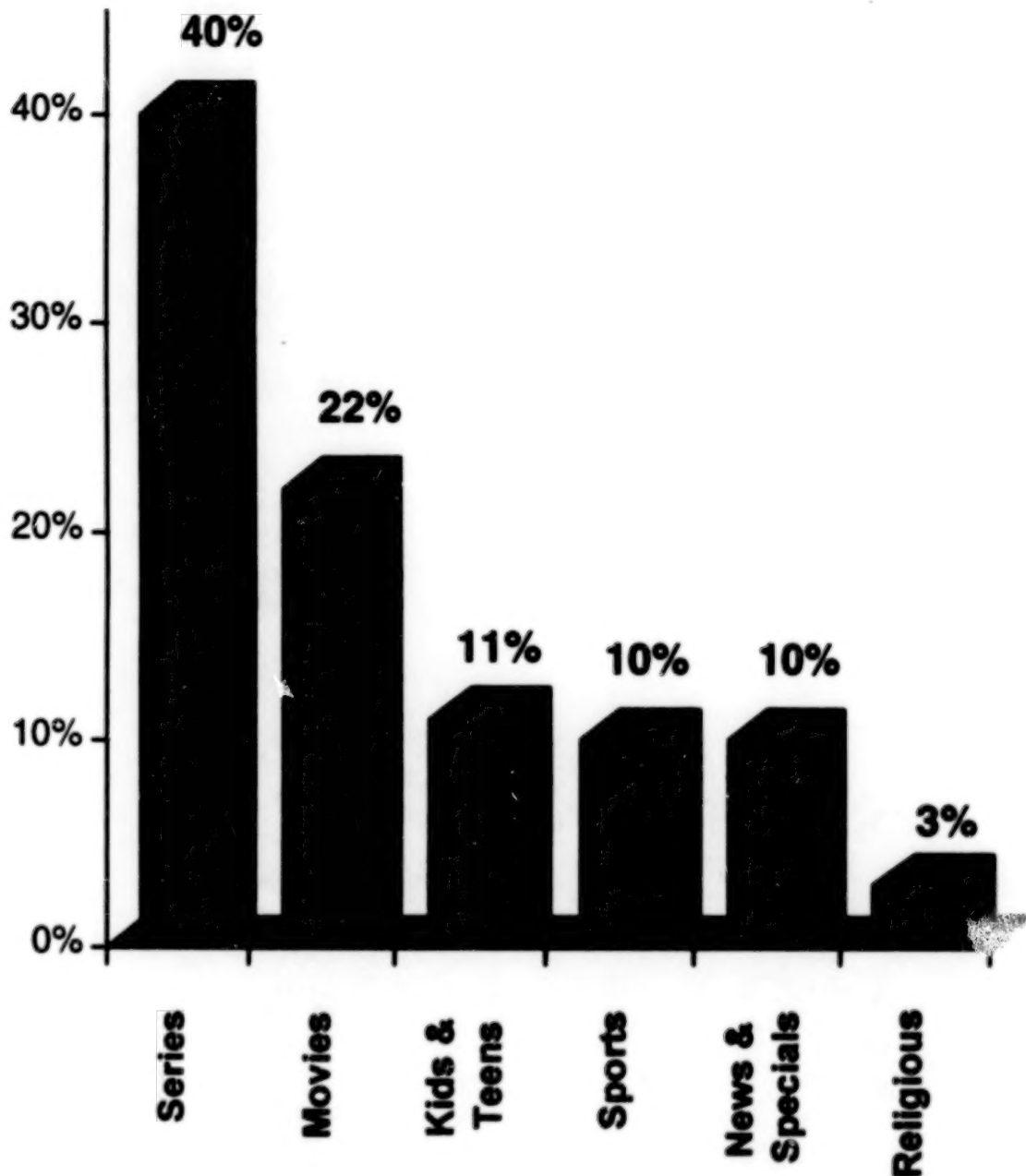
Percentage Who Watch Frequently or Occasionally



Network	Percentage
NBC	93.0%
ABC	91.8%
CBS	91.0%
FOX	85.6%
DISCOVERY	77.2%
USA	75.3%
WTBS	75.2%
CNN	73.8%
A&E	71.0%
WEATHER	70.5%
PBS	70.3%
TNT	69.9%
WGN	68.7%
HEADLINE	67.7%
WPIX	65.8%
LIFETIME	65.3%
FAMILY	63.3%
ESPN	62.9%



Viewers Watch UVTW/WGN For The Variety



* Percentage of sports programming varies from 15% of schedule April - September to 5% October - March
Source: Synergy Marketing Associated Focus Group Study, 1995



**GENERAL COUNSEL
OF COPYRIGHT, EINKELSTEIN, THOMPSON & LOUGHRAN**

APR 28 1997

RECEIVED

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Comment Letter	
RM	87-1
No.	32

April 28, 1997

ORIGINAL

VIA HAND DELIVERY

Nanette Petruzzelli, Esq.
Acting General Counsel
Office of the General Counsel
Copyright Office
James Madison Memorial Building
Room LM-403
First and Independence Avenue, S.E.
Washington, D.C. 20540

Re: Revision of the Cable and Satellite Carrier Compulsory Licenses; Public Meetings
Docket No. 97-1

Dear Ms. Petruzzelli:

On behalf of the Canadian Claimants Group, enclosed please find an original and 14 copies of formal written testimony, entitled "Comments of the Canadian Claimants Group," in the above referenced proceeding.

Sincerely,



Victor J. Cosentino

Enclosures

Comment Letter
97-1
No. 32

Before the
U.S. COPYRIGHT OFFICE
Library of Congress
Washington, D.C.

GENERAL COUNSEL
OF COPYRIGHT

APR 28 1997

RECEIVED

In the matter of the

Revision of Cable and
Satellite Carrier Compulsory
Licenses; Public Meetings.

Docket No. 97-1

COMMENTS OF THE CANADIAN CLAIMANTS GROUP

The Canadian Claimants Group hereby submits comments in response to the Copyright Office's Notice, as revised, in the above captioned proceeding. 62 Fed. Reg. 13396 (March 20, 1997); 62 Fed. Reg. 18655 (April 16, 1997).

BACKGROUND

The Canadian Claimants Group is an *ad hoc* group of Canadian copyright owners, including public and private Canadian broadcasters and Canadian film and television production companies,¹ whose programming was shown on Canadian television stations retransmitted as distant signals by U.S. cable

¹ The most current list of the members of the Canadian Claimants Group is attached as an Appendix.

systems pursuant to the cable compulsory license. 17 U.S.C. § 111.² These individual claimants have regularly agreed to jointly assert their claims in the cable distribution proceedings for royalties paid for the retransmission of Canadian stations and to distribute the awarded royalties among themselves. The Canadian Claimants Group has represented Canadian copyright owners in compulsory licensing matters since 1979.

Congress included Canadian stations in the compulsory license granted to U.S. cable operators because cable operators wanted to carry Canadian stations.³

² Canadian television stations are not subject to the satellite compulsory license because it applies only to stations licensed by the Federal Communications Commission ("FCC"). 17 U.S.C. § 119.

³ Canadian signals were discussed in the revision notes of the 1976 Act:

CANADIAN AND MEXICAN STATIONS. Section 111(c)(4) provides limitations on the compulsory license with respect to foreign signals carried by cable systems from Canada or Mexico. Under the Senate bill, the carriage of any foreign signals by a cable system would have been subject to full copyright liability, because the compulsory license was limited to the retransmission of broadcast stations licensed by the FCC. The Committee recognized, however, that cable systems primarily along the northern and southern border have received authorization from the FCC to carry broadcast signals of certain Canadian and Mexican stations.

In the Committee's view, the authorization by the FCC to a cable system to carry a foreign signal does not resolve the copyright question of the royalty payment that should be made for copyrighted programs originating in the foreign country. The latter raises important international questions of the protection to be accorded foreign copyrighted works in the United States. While the Committee has established a general compulsory licensing scheme for the

Congress, however, clearly recognized the international significance of their decision to subject the works of foreign copyright owners to a U.S. compulsory license. The Committee that wrote section 111 stressed that the foreign copyright owners whose programs were broadcast on Canadian and Mexican stations were entitled to their fair share of the royalties collected:

The Committee wishes to stress that cable systems operating within these cable zones are fully subject to the payment of royalty fees under the compulsory license for those foreign signals retransmitted. The copyright owners of the works transmitted may appear before the Copyright Royalty Commission and, pursuant to the provisions of this legislation, file claims to their fair share of the royalties collected. Outside the zones, however, full copyright liability would apply as would the remedies of the legislation for any act of infringement.

House Report No. 94-1476, *reprinted in* 17 U.S.C.A. § 111, Historical and Statutory Notes, at 269.

Under the compulsory license, cable systems can carry Canadian signals, and thus Canadian programming, only in a narrow geographic band running

retransmission of copyrighted works of U.S. nationals, a broad compulsory license scheme for all foreign works does not appear warranted or justified. Thus, for example, if in the future the signal of a British, French, or Japanese station were retransmitted in the United States by a cable system, full copyright liability would apply.

With respect to Canadian and Mexican signals, the Committee found that a special situation exists regarding the carriage by U.S. cable systems on the northern and southern borders, respectively.

House Report No. 94-1476, Notes of the Committee on the Judiciary, *reprinted in* 17 U.S.C.A. § 111, Historical and Statutory notes, at 268.

across the northern United States (i.e., by U.S. cable systems that are north of the forty-second parallel or within 150 miles of the U.S.-Canadian border, whichever is further). 17 U.S.C. § 111(c)(4). Distant carriage of Canadian signals is concentrated, therefore, primarily in New England, upstate New York, Michigan, and Washington state.

SUMMARY OF COMMENTS

As copyright owners, the general position of the Canadian Claimants Group is that free market negotiation is the best method for licensing the distribution of television programming. Yet, we recognize that despite the superiority of free market negotiations, compulsory licenses have become a fixture of the communications marketplace and so are unlikely to be eliminated any time soon. We therefore focus our comments on recommendations for minimizing the complexities of the current compulsory licensing scheme and for restricting the adoption of additional compulsory licenses. Specifically, we recommend: (1) not extending the licenses to address new technologies unless those technologies are so similar to cable systems in nature as to be virtually indistinguishable in their effects on copyright owners; and (2) modifying the laws governing the existing licenses to reduce the complexity and increase the fairness of distributions and rate adjustments.

DISCUSSION

1. **New Compulsory Licenses Must Be Carefully Tailored and Should Not Be Extended to Address New Technologies Unless Those Technologies Are So Similar to Cable Systems in Nature as to Be Virtually Indistinguishable in Their Effects on Copyright Owners.**

In its Notice, the Copyright Office asked: "Should new types of broadcast retransmission services, such as open video systems provided by telephone companies and retransmission services via the Internet, have their own separate compulsory licenses?" Combining Internet and open video systems ("OVS") technologies under the single rubric of "new types of broadcast retransmission services" raises a serious issue for copyright owners. We see these two retransmission services as distinctly different, not simply in their underlying technologies but in their geographic reach and ease of deployment by entities seeking to retransmit distant signals.

An open video system is functionally the same as a cable system, though it is subject to a different regulatory scheme. OVS allows local telephone companies, or others wishing to invest in new infrastructure, to act like cable system operators, retransmitting broadcast stations and transmitting cable networks to subscribers through the local telephone or other communications system. The geographic reach of each OVS operator is limited to the geographic reach of its system. Further, the OVS technology and FCC regulations

authorizing the technology effectively limit OVS deployment to large, well-funded companies such as local telephone companies that have an installed communications system or other companies that can afford to install such a system. *See generally, In re Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems, Second Report and Order*, CS Docket No. 96-46, FCC 96-249, 61 Fed. Reg. 28697 (June 5, 1996; Released June 3, 1996). Limiting deployment to large companies effectively limits the number of times a signal will be retransmitted and provides certain assurances that the compulsory license royalties will be paid.

In contrast, Internet technology could allow retransmission of copyrighted material to any point in the world by almost anyone. Readily available and inexpensive computer hardware and software allow a signal to be pulled off the air and retransmitted to distant viewers. While current Internet technology provides for transmission of relatively poor video quality, picture quality will improve rapidly given current trends in the Internet and computer industries. Transmission technology has already improved to the point that live or stored radio broadcasts are widely available on sites throughout the Internet.⁴ Further, it

⁴ To distribute audio and video over the Internet in real time, Web sites use a technology called "streaming" audio and video. Streaming audio and video allow Internet users to instantly access live video and audio feeds without having to download large files before viewing. One provider of this technology, Progressive Networks, has samples of streaming video using its RealPlayer

is quite conceivable that the revenues received by these Internet retransmitters, if any, will not be high enough to result in any worthwhile additional royalties for the copyright owners. Thus, given the low barriers to entry, Internet technology allows virtually anyone to retransmit copyrighted material, causing serious losses to the copyright owners.

Moreover, a nascent free market is rapidly evolving on the Internet.

Numerous broadcasters and content providers are actively engaged in putting their programs on the Internet either at their own sites or by supplying content to other sites. Television and radio stations from all over the world have web sites and live or taped audio programs are widely available.⁵ Broadcast video programs are also finding their way online.⁶ Numerous news and data services that traditionally supply broadcast and print media, now are contracting to

software at its World Wide Web site. See <http://www.real.com>.

⁵ For example, radio broadcasts are becoming fairly common on the Internet. Organizations like the Canadian Broadcasting Corporation (<http://www.radio.cbc.ca/index.html>), National Public Radio (<http://www.real.com/content/npr.html>) and ABC News (<http://abcradio.ccabc.com>) all have radio broadcasts available on the World Wide Web.

⁶ The Timecast website offers access to sixty news and entertainment sites that use RealPlayer audio and video. See <http://www.timecast.com/videoguide.html/>. Specific examples of broadcasters who are beginning to use the Internet to directly deliver their programs include FOX (<http://www.foxnews.com/newsnow/>) and KRON (<http://www.kron.com>).

provide content to a wide variety of Web sites.⁷ A compulsory license would undermine the fledgling efforts of these copyright owners to use and license their works in the Internet market.

Thus, it is clear that any compulsory license for new broadcast retransmission services must be carefully tailored to each service's specific underlying technology. The notion of a single uniform compulsory license for all retransmission technologies, while appealing in theory, is not feasible or desirable in practice.

Further, we are generally opposed to expansion of the compulsory license to new broadcast retransmission services, unless those services are analogous to conventional cable systems. While compulsory licenses might promote competition by subsidizing new, developing technologies, copyright owners should not be required to subsidize every new entrant into the communications field. Moreover, compulsory licenses distort the marketplace by denying copyright owners the opportunity to maximize revenues from their works. New services should be allowed to develop without the artificial constraints of a compulsory license. Therefore, we recommend against granting compulsory

⁷ For example, Reuters Ltd., SportsTicker Enterprises LP, Weathernews Inc., Business Wire, and PR Newswire all provide news feed services to the Yahoo (<http://www.yahoo.com>) website. Reuters, among others provides news to America Online. Associated Press provides news to the Washington Post's website (<http://www.washingtonpost.com>)

licenses to new broadcast retransmission services unless those services are essentially the same as cable systems.

2. The Laws Governing the Existing Cable License Should Be Modified to Provide for Simpler Administration by the Copyright Office and to Reduce the Complexity and Increase the Fairness of Distribution and Rate Adjustment Proceedings.

Given that the existing cable compulsory license is unlikely to be eliminated soon, we recommend making several important changes to the regulatory scheme to decrease its complexity and increase its fairness to all parties.

The current royalty distribution method is cumbersome, extremely expensive for smaller claimants and results in inequitable distributions. We propose that the cable license be modified in the following four ways: (a) eliminate the current rate mechanism (including the sliding scale for cable's basic fund and the 3.75% fee) and replace it with per signal, per subscriber rates similar to the rate system used for the satellite license; (b) equalize the rates for cable and satellite and establish a joint satellite/cable rate adjustment proceeding; (c) eliminate the artificial distinctions between Form 1, Form 2, and Form 3 systems and require all systems to pay the same rates for the signals on a per signal, per subscriber basis; and (d) eliminate the various exceptions from royalty payments due to reliance on outdated FCC rules or waivers.

A. Establish a Per Signal, Per Subscriber Rate for the Cable Compulsory License.

We recommend establishing a per signal, per subscriber rate system for the cable compulsory license similar to that used in the satellite license. Making this change would eliminate most of the problems with the current licensing scheme by simplifying the distribution process.

- (i) **The current distribution system is overly complex and results in inequitable distributions.**

The copyright statutes and regulations deliberately provide little guidance as to how collected royalties should be distributed among claimants.⁸ In fact, the current cable royalty fee system exacerbates the complexity of the task of distributing the Basic royalties, the largest component of the royalty fund, by not tying the amount paid by a cable system to the carriage of particular signals. Instead, the royalties are paid based on a sliding rate scale that is applied to the total number of distant signals carried. The fees collected then are lumped together in a common fund.

When copyright owner groups cannot agree among themselves to a distribution, they are forced to enter a free-for-all arbitration under the auspices of a Copyright Arbitration Royalty Panel ("CARP"). The last such proceeding

⁸ House Report No. 94-1476, Notes of the Committee on the Judiciary, reprinted in 17 U.S.C.A. § 111, Historical and Statutory notes, at 271.

for cable, the 1990-1992 Distribution Proceeding, took 50 days of hearings and produced a record of approximately 15,000 pages. The CARP produced a 175 page report plus a four page supplemental report. The Librarian of Congress issued its own 64 page determination, rejecting the CARP's report in part and affirming in part. *Distribution of 1990, 1991 and 1992 Cable Royalties*, 61 Fed Reg. 55653 (Oct. 28, 1996). Despite all the briefing, witness testimony and cross-examination, exhibits and the extensive final reports of the CARP and the Library, four of the six parties to this proceeding were so dissatisfied with the results that they have appealed to the Court of Appeals for the District of Columbia Circuit. See Office of the Commissioner of Baseball v. Librarian of Congress, No. 96-1445 (consolidated with Nos. 96-1449, 96-1450, 96-1451), (D.C. Cir. Nov. 27, 1996). This appeal will be probably be briefed during the summer and fall with argument heard at the end of 1997 and a decision in the first part of 1998. Assuming the Court affirms and no party appeals further, it will be eight years between collection of the 1990 royalties and a final distribution of those funds. And still, it is unlikely that all of the parties will be satisfied.

The Canadian Claimants Group, the smallest claimant group participating in the arbitration, was forced to actively participate throughout the entire proceeding (and now through the appeal) to obtain (and now protect) its award of

less than 1% of the Basic Fund. This participation was required because the royalty distribution system is a zero-sum game. We had to fight with all other parties over a share of all Basic royalties. We could not limit our participation to the distribution of only those royalties paid for Canadian distant signals. Our award, representing only a modest, and long overdue, increase over prior awards came at a cost in litigation fees and expenses that was disproportionately large compared to the costs borne by the larger parties.

We believe future arbitrations, which are likely to be even more contentious than the 1990-1992 proceeding,⁹ can be simplified greatly by adopting the satellite license's more rational method of per signal, per subscriber fees combined with the eligibility criteria explained in the last decision of the Copyright Royalty Tribunal ("CRT").

- (ii) **This method is simpler and confines distribution controversies to eligible claimants.**

Adoption of the per signal, per subscriber methodology, as used in satellite would be fairly simple. We recommend eliminating the concepts of Distant Signal Equivalents, the current sliding-scale base rate formula, and the 3.75% rate formula (plus the Form 1, 2, and 3 distinctions and all the various

⁹ Moreover, no settlement has been reached for 1993 or 1994 funds and no consideration has even been given to the 1995 and 1996 funds. Resolution of those disputes and final distribution of the funds will take us well into the next century.

exceptions to payment due to outdated FCC rules and waivers as discussed below). Under our proposal, the cable operator would continue to report the call signal of each distant signal and would pay a fee for each distant signal carried based on a set rate for the signal type times the number of system subscribers. Not only would this simplify the calculation of fees, but it would establish a relationship between the royalty payments and the identity of the actual programming on the signals carried. Under this scheme, the Copyright Office would collect the money from cable operators and allocate it into royalty funds based on signal type. This step would be a tremendous aid to the rational distribution of the royalties collected, since only claimant groups with programming on a signal type would then be "eligible" to seek a share of that royalty fund.

The "eligibility" criteria, an implicit part of the per signal, per subscriber approach, is not a new concept in the history of royalty distributions. The CRT used eligibility in the context of 3.75% and Syndex royalties and in the satellite distribution proceeding. Basically, the CRT found that a claimant group could not receive a share of the royalties paid for a signal type unless they had programming on that signal type. Though the point is basic common sense, it has never been applied to the Basic fund in cable distribution proceedings.

In the last satellite distribution proceeding, the CRT explained:

The issue is one of eligibility--are the Networks eligible to receive royalties paid by satellite carriers to retransmit programs [on superstations] which are not owned by the Networks? Based on precedent, logic, and fundamental fairness, the Tribunal is unable to permit the Networks to share these royalties.

Consolidated 1989-1991 Satellite Carrier Royalty Distribution Proceeding, 57

Fed. Reg. 62422, 62425 (Dec. 30, 1992) (emphasis added).

The issue faced by the CRT in that first ever satellite royalty proceeding was whether U.S. network claimants should be permitted to share in the royalties paid by satellite carriers for the carriage of superstations (which cost 12 cents per subscriber per month) even though no network programs were broadcast by superstations, or alternatively, should those claimants be confined to the royalties paid for the carriage of network affiliates (which cost 3 cents per subscriber per month). At the urging of the Program Suppliers, Joint Sports Claimants, Broadcasters, Music Claimants and Devotional Claimants (many of the same groups from the Phase I cable proceedings who banded together as the "Certain Copyright Owners" or "CCO") the CRT agreed that it was illogical and fundamentally unfair to allow copyright claimants to receive royalties that were paid for signals that did not carry their programs. 57 Fed. Reg. at 62424-62426.

The CRT adopted the argument of the CCO that such an outcome was dictated by the 1983 cable royalty decision that established separate 3.75% and

Syndex funds that are limited to eligible claimants only. 57 Fed. Reg. at 62423-

62426. With respect to the claim of the Network Claimants, the CRT stated that:

The Networks seek to blur the 12 cent superstation and 3 cent network/public television station categories and commingle the royalty payments for an obvious reason--it is the only way they can tap into the larger stream of revenues from the superstations and avoid the reality that the Networks seek a share of royalties: (i) they did not earn; (ii) based on programs they did not furnish; (iii) paid for stations that did not carry their programming. Payment to the Networks from a fund which categorically, demonstrably, and unambiguously excludes any network owned programming is neither logical nor fair. Not only would the Networks receive royalties for which they were not entitled, but, because it is a zero-sum game within each category, the other program owners would be deprived of royalties to which they are entitled.

57 Fed. Reg. at 62426 (emphasis added).

This general rule, established in its last published decision, brought the CRT back almost full circle to the basic copyright principles it recognized in the 1978 proceeding. There, the CRT recognized that "Congress imposed copyright liability on cable systems and determined that they should pay royalties to the creators of the programs they retransmit." 1978 Cable Royalty Distribution Determination, 45 Fed. Reg. 63026, 63036 (Sept. 23, 1980) (footnote omitted).

By recognizing eligibility as a factor, the CRT acknowledged the compulsory licensing scheme's and (indeed copyright law's) basic tenet that royalties flow from the users of a work to the creator of that work. Eligibility

binds the payments made by cable operators who retransmit signals containing particular programs to the copyright owners of those same particular programs.

(iii) This system better reflects market value while simplifying the distribution process.

In practice, the per signal, per subscriber fees can be pooled by signal type by the Copyright Office and then paid to the claimant group or groups eligible to share the royalties paid for that signal type. Eligibility is determined on the basis of whether the copyright claimant group had programming that was retransmitted on the signal type.¹⁰ In the event that claimant groups to a signal type cannot agree among themselves on the distribution, a Phase-I type proceeding could resolve the issue.

For example, only three claimant groups have programming on Canadian signals and would therefore be eligible to share in the royalties paid for Canadian distant signals: (1) the Canadian Claimants Group, (2) Program Suppliers, and (3) Joint Sports Claimants. We strongly believe we could negotiate an agreed allocation with those other two groups; if we could not, the dispute over the

¹⁰ Individual copyright owners can be, and frequently are, members of more than one claimant group. For example, certain Canadian copyright owners sell their programming to Canadian, educational and U.S. commercial stations. As a result, those claimants currently are, and in the future would remain, members of the Canadian Claimants Group, Public Television Claimants and Program Suppliers depending on the station type or types that broadcast their programming.

Canadian signal royalty pool would be limited to just those groups and a hearing that would last only two weeks or less. That would mean that the Canadian Claimants would not have to participate in or attend hearings involving royalties paid for U.S. stations. This would be a huge cost savings to such a small claimant group.

Public Television would also benefit greatly from this system since their claim is limited to educational stations. Under this system, Public Television would be entitled to all the royalties paid for educational signals. No other claimant groups would be eligible to make a claim against those royalties, unless they could show that their programming was broadcast by educational stations. In all probability, Public Television would never again have to participate in a contested distribution proceeding.

Realistically, adoption of this approach might not eliminate the epic battles between Program Suppliers and Joint Sports Claimants, but it would focus the scope of their conflict, allow a CARP to concentrate on narrower issues, and allow other parties to possibly avoid participating altogether.

A final advantage of this method is that it automatically accounts for changes in the market demand for programming. If the demand for programming on a certain signal type increases, causing an increase in distant carriage, it will be directly reflected in an increase in the royalty pool for that

signal type. The owners of the programming shown on the signal type will be rewarded. Those owners will be spared the expense and risk in a distribution proceeding that the additional royalties paid for the increased carriage of the signals that carried their programming will be awarded to claimant groups that had no programming on those signals.¹¹

B. Make the Rates in the Cable and Satellite License the Same.

From a copyright owner's perspective, there is no sound economic reason to justify a difference in the license fee to retransmit a copyrighted program by satellite as opposed to cable. The cable or satellite subscriber derives the same benefit from the programming regardless of how it arrived at that subscriber's home. The cable or satellite system operator derives the same benefit from providing the retransmission. The copyright owner suffers the same harm from having its program retransmitted. Therefore, we recommend that rates should be equalized by statute and then adjusted periodically using a consolidated rate adjustment proceeding that sets identical rates for both licenses. The standard should be the fair market value of the entire basket of copyrighted works on the

¹¹ This same benefit provides an incentive for copyright owners, if they so choose, to negotiate with cable operators to derive a compulsory license rate that will maintain or increase the carriage of the signal type carrying their programming.

signal, using the criteria established in the satellite compulsory license scheme.¹²

Each signal type may have a different fair market value based on the types and amounts of eligible programming generally carried on that signal type. The market value of each signal type can be established either by negotiation or, if necessary, through a rate adjustment proceeding.¹³ We believe that foreign

¹² 17 U.S.C. § 119(c)(3)(D) describes the criteria for establishing royalty fees as follows:

"In determining the fair market value, the Panel shall base its decision on economic, competitive, and programming information presented by the parties, including--

(i) the competitive environment in which such programming is distributed, the costs for similar signals in similar private and compulsory license marketplaces and any special features and conditions for the retransmission marketplace;

(ii) the economic impact of such fees on copyright owners and satellite carriers; and

(iii) the impact on the continued availability for secondary transmission to the public."

¹³ Indeed, an argument can be made that the compulsory license price should be set unilaterally by the copyright owners on a take-it or leave-it basis for all cable or satellite system owners. This would eliminate the need for rate adjustment proceedings as long as the claimant groups can agree among themselves on the price for the signal. This method would work in concert with collective administration of a copyright compulsory license. Each collective could be made up of copyright owners whose programming is carried on a particular signal type, similar to the claimant groups that now appear in compulsory license proceedings. That collective could then set the price for the signal type, perhaps even on a station-by-station basis. Ultimately, this method would supplant the compulsory license with a means for negotiation between

signals should continue to be treated as independent signals under a joint rate adjustment proceeding.¹⁴

C. Eliminate Artificial Discounts for Smaller Systems.

Going to a per signal, per subscriber system would justify eliminating the artificial discounts for smaller systems under the existing cable compulsory license. These distinctions between smaller and larger systems (Forms 1, 2, and 3) are based on basic service rate gross receipts. 17 U.S.C. § 111(d); 37 C.F.R. § 201.17(d)(2). This distinction would have no basis in a licensing scheme that already accounts for the size of each cable system by factoring in the number of system subscribers.

The unfairness to copyright owners of basing the royalties on basic service rate gross receipts was exacerbated by cable rate re-regulation following passage of the *Cable Television Consumer Protection and Competition Act of 1992*, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"). This Act, which became effective in September 1993, rolled back cable rates and resulted in widespread re-tiering and repricing of cable services. This had immediate and

cable or satellite owners and a collective agency that licenses the rights to retransmit the programming. The collective nature minimizes the transaction costs for all involved while eliminating the offense to free market negotiations caused by the compulsory license.

¹⁴ Canadian and Mexican distant signals are treated as independent signals for the purposes of calculating royalty fees. 17 U.S.C. § 111(f).

substantial effects on the compulsory license royalty payments. In 1993, royalties decreased 2% from 1992 levels. In 1994, they went down 13% from 1993. Copyright Office, Licensing Division, *Report of Royalties* (April 23, 1997). These decreases represent a tremendous net change because there otherwise has been consistent growth in the cable royalty fund, *id.*, reflecting a consistent expansion of the industry. Obviously, Congress never anticipated the dramatic growth of the cable industry nor the recent consumer driven demand for rate re-regulation when it created the compulsory licensing scheme in the late 1970s.

Eliminating the artificial discounts for smaller systems eliminates the loss of copyright royalties caused by the arbitrary demarcations between Form 1, 2 and 3 systems. Our review of the data from Statements of Account filed by the sixty to seventy Form 3 cable systems that carry Canadian distant signals indicates that in recent years six systems changed to Form 2 status, substantially reducing their royalty obligations. Three of those systems became Form 2 in 1996, long after the industry adjusted to rate re-regulation. While Cable systems carrying Canadian distant signals make up less than three percent of all Form 3 cable systems,¹⁵ it is reasonable to believe that this situation has probably

¹⁵ Based on Statement of Account data compiled by Cable Data Corporation.

occurred throughout the industry. As a result, this arbitrary distinction has cost all copyright owners substantial royalties.

D. Eliminate the Application of Outdated FCC Rules.

We also would support eliminating the application of outdated FCC rules and waivers. In particular, we would like to see the elimination of "significantly viewed" status as a basis for treating a physically distant signal as local.¹⁶ The rule has no current relevance and simply serves to reduce compensation to copyright owners already undercompensated by the compulsory license and to exempt large numbers of cable systems from paying anything for distant signals.

The application of this rule is particularly damaging to the Canadian Claimants Group. Under this rule, distant Canadian signals can be deemed local thereby denying copyright owners royalty payments. Yet, as "local" signals they are not entitled to program exclusivity, "must-carry" or retransmission consent rights.¹⁷ Also, because advertising on Canadian stations is directed at Canadian audiences, not American, Canadian broadcasters cannot derive any additional income from advertisers for distant carriage in America. This means the

¹⁶ "Significantly viewed" is defined under FCC regulations at 47 C.F.R. § 76.54.

¹⁷ "[A] television broadcast station licensed by a foreign government shall not be entitled to assert a claim to carriage, program exclusivity, or retransmission consent authorization pursuant to Subpart D or F of this part, but may otherwise be carried if consistent with the rules on any service tier." 47 C.F.R. § 76.5(b).

broadcasters cannot pay Canadian program suppliers more for their content in compensation for the retransmission.

Eliminating this arcane and obsolete system also will ease the administrative burden of the Copyright Office and facilitate quicker processing of Statements of Account. Our review of Statements of Account filed in the Copyright Office indicates that much of the correspondence between the Office and cable system operators concerns disputes over the application of various FCC waivers, exceptions and grandfather clauses. Eliminating these relics of past regulatory schemes will end many of these disputes and so avoid the Copyright Office's time-consuming efforts to resolve them.¹⁸

CONCLUSION

In sum, the Canadian Claimants Group recommends that the compulsory license scheme be improved in the manner described above to make the distribution process simpler and more equitable.

Specifically, we recommend: (1) not extending the compulsory licenses to address new technologies unless those technologies are so similar to cable

¹⁸ Whether the change is made or not, the Copyright Office should notify representatives of the established claimant groups each time the Office discovers a discrepancy in a Statement of Account and is unable to resolve that discrepancy with the cable or satellite system operator. This would allow the copyright owners to be informed of the potential copyright infringement and so have the opportunity to pursue their remedies in a timely manner.


systems in nature as to be virtually indistinguishable in their effects on copyright owners, and (2) modifying the laws governing the existing licenses to reduce the complexity and increase the fairness of distributions and rate adjustments.

Our recommendations for modifying the cable compulsory license are: (a) eliminate the concepts of Distant Signal Equivalents, the sliding scale for cable's basic fund, and the 3.75% rate and replace it all with per signal, per subscriber rates similar to the rate system used in the satellite license; (b) make the cable license rates the same as the satellite license rates and establish a joint satellite/cable rate adjustment proceeding; (c) eliminate the artificial distinctions between Form 1, Form 2, and Form 3 systems and make all systems pay the same rates for the signals on a per signal, per subscriber basis; and (d) eliminate the various exceptions from royalty payments due to reliance on outdated FCC rules or waivers.

Respectfully Submitted,

Date:

April 28/97



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APPENDIX
Members of the Canadian Claimants Group

591755 Saskatchewan Ltd./JC Film Crew Prod.
879310 Ontario Ltd./Sketches of Our Town
ACPAV
Allegro Films
Alliance Communications Corp.
Animation Ciné-Groupe J.P. Inc.
Atlantis Releasing Inc.
Baton Broadcasting Inc.
Beaver Creek Pictures
Cambium Film and Video Productions Ltd.
Canadian Broadcasting Corporation
CAP Communications
CFCF Inc.
Cinar Productions Inc.
Cinepix Inc.
Cinevideo Plus
CKWS TV, A Division of Power Broadcasting Inc.
CKY-TV, a Division of Moffat Communications Limited
Cogeco Radio and Television Inc.
Communications Claude Heroux Inc.
Coscient Inc.
Crossroads Christian Communications Inc.
CTV Television Network Ltd.
Distribution Ciné-Groupe
Driver's Seat Productions Ltd.
Filmoption International Inc.
Food For Life
Global Communications Ltd.
Guitarman Productions Inc.
Heartland Motion Pictures Inc.
Idéacom international inc.
Kinémage International Inc.
L'Équipe Spectra
Les Productions Avanti Ciné Video Inc.
Les Productions Bibi et Geneviève Inc.

Les Productions Espace Vert Inc.
Les productions du Verseau
Les Productions La Fête Inc.
Les Productions Videofilms Ltee.
Malofilm Distribution Inc.
Metanoia Outreach Association of Canada
Missing Treasures Productions Inc.
Nelvana Enterprises Inc.
New Wilderness Distribution Inc.
Once and Future Films Inc.
Owl Communications
Productions J.B.M. Inc.
Ralph C. Ellis Enterprises Ltd.
S & S Productions
Salter Street Films Ltd.
SDA Productions Ltd.
Settler Film Productions Inc.
Soapbox Productions Inc.
Sullivan Entertainment International Inc.
Sunrise Films Ltd..
Télé-Métropole Inc.
Telescene Film Group Inc.
Telemagik Productions Inc.
The Atlantic Television System
The National Film Board of Canada
The Ontario Educational Communications Authority
Thunder Bay Electronics Limited
TVOntario
Two For Joy Productions Inc.
Utopia Productions/612043 Saskatchewan Ltd.
Westcom TV Group Ltd.
William F. Cooke Enterprises Inc.

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28 April 1997

Nanette Petruzzelli, Esq.
Acting General Counsel
United States Copyright Office
Room LM-403
James Madison Memorial Building
Washington, D.C. 20024

Dear Ms. Petruzzelli:

Nanette:

Enclosed please find 15 copies of the written submission of AskyB in the "§ 111/§ 119" public meetings (your docket number 97-1).

Please note that we have not submitted any questions that we would have you ask others; we are confident that the experience and judgment of you and your colleagues will serve the public interest well.

Please stamp the un-enclosed "16th copy" and return to us.

If you have any questions, please call. Thank you very much.

Very truly yours,


Christopher A. Meyer

CAM/rj
Enclosures

GENERAL COUNSEL
OF COPYRIGHT

APR 28 1997

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GENERAL COUNSEL
OF COPYRIGHT

APR 28 1997

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Comment Letter
RM 97-1
No. 32

**Before the
United States Copyright Office
Library of Congress
Washington, D.C. 20559**

GENERAL COUNSEL
OF COPYRIGHT, 

APR 28 1997

RECEIVED

In the Matter of the
Revision of the Cable and
Satellite Compulsory Licenses

Docket No. 97-1

**WRITTEN SUBMISSION OF PRESTON PADDEN,
CHAIRMAN AND CHIEF EXECUTIVE OFFICER OF
AMERICAN SKY BROADCASTING ("ASkyB")¹**

ASkyB respectfully submits the following comments in response to the Copyright Office's Notice (62 Fed. Reg. 13396, Mar. 20, 1997) regarding its examination of possible revisions of the cable and satellite compulsory licenses. ASkyB will limit its comments to the relevance of these two compulsory licenses to its plans to retransmit local broadcast stations to subscribers when ASkyB launches its Direct Broadcast Satellite ("DBS") service later this year.

In addition to stressing the importance of the delivery by satellite carriers of local broadcast signals to local audiences, ASkyB's comments endorse the adoption of amendments to the Copyright Act to:

- ensure that the determination of what constitutes a "local commercial television market" with respect to the satellite-retransmission of local broadcast signals is consistent with the definition of "local" market for cable systems under §111.

¹ Mr. Padden's statement is submitted on behalf of ASkyB. We note for the record that recently, the News Corporation Limited—a principal owner/investor in ASkyB—announced its plans to acquire 49.9% of EchoStar—an existing DBS carrier. Together ASkyB and EchoStar propose to launch a new DBS service known as "Sky." The overall legal and policy issues discussed in this submission remain the same whether or not the proposed transaction is finalized.

- provide—assuming the survival of the cable and satellite compulsory licenses—satellite carriers with the same copyright rate paid by cable systems (and all other multichannel video programming distributors) when they locally retransmit local television broadcast signals: zero, and
- reaffirm and clarify that the law provides satellite carriers with the necessary legal authority to retransmit local broadcast signals to local audiences.

I. OVERVIEW OF ASkyB'S POSITION ON THE §§111 AND 119 COMPULSORY LICENSES.

Early in its March 20, 1997 notice, the Copyright Office poses two crucial questions:

- is there is a continuing need for the cable and satellite licenses, or
- should cable and/or satellite carriers be required to negotiate the licensing of broadcast programming in the free marketplace? ²

For ASkyB the answers to these questions are simple and straightforward. It is our position that the §§111 and 119 compulsory licenses could be eliminated from the United States Code and that all broadcast retransmissions could be cleared in the free market. We would support a recommendation by the Copyright Office to Congress to eliminate these two licenses. However, as long as Congress chooses to retain the §§111 and 119 compulsory licenses, then these licenses should treat all multichannel video program distributors the same with respect to the retransmission of local broadcast signals. Cable companies, multipoint multichannel distribution systems ("MMDS"), satellite master antenna television systems ("SMATVs"), phone companies and satellite carriers *all* should be permitted to retransmit local broadcast signals, and they should *all* pay the same zero compulsory license rate for such retransmission.³

² 62 Fed. Reg. at 13398.

³ The zero rate for §111 retransmissions of local broadcasts stems from the fact that cable systems are granted a compulsory license for all their "secondary transmissions to the public of a primary transmission made

After all, it's the same signal, the same programs, and the same customer; all that differs is the technology employed to deliver the signal. Therefore, if the cable and satellite licenses remain on the books—either separately or in a harmonized format—this Office and Congress must make certain that all technologies are treated equally—particularly with respect to the scope of authority to retransmit signals and the compulsory royalty rate—when they retransmit local broadcast signals.

II. DELIVERY OF LOCAL BROADCAST SIGNALS TO SATELLITE SUBSCRIBERS.

A. Overview.

ASkyB is a new entrant in the already crowded field of multichannel video programming distributors. It plans to initiate service to the public as early as the end of this year. Given the dominance of the cable television industry and the established position of other satellite carriers, ASkyB recognizes that this will be a difficult marketplace to crack. But ASkyB plans to be the first satellite service to offer subscribers the *retransmission by satellite of local broadcast stations*. ASkyB hopes that this innovation will enable it to earn a place in the marketplace, even as a newcomer, and that its service will provide—for the first time—real competition to the dominant cable television industry.

Today, satellite carriers *do not* retransmit local broadcast television signals to their subscribers. Instead, satellite subscribers receive their local stations in one of two ways. First, they can also subscribe to the local cable service. Second, they can use an off-air antenna. Then, they may use either service in combination with a device known as an A/B switch which allows them to switch back and forth between satellite and other signals. But experience has shown that the A/B switch is not a truly effective means of providing consumers with access to local stations. Many consumers do not

by a broadcast station....” 17 U.S.C. §111(c) (1). But the royalty rate for such secondary retransmissions is calculated solely on the basis of distant signals without reference to any local signals carried. 17 U.S.C. §111 (d) (1) (B). Moreover, in the cases where a cable system does not retransmit the signals of any distant television broadcast signals, it must pay a minimum license fee for the privilege of retransmitting distant signals should it decide to do so in the future. 17 U.S.C. §111 (d) (1) (B) (i).

have an outdoor antenna or live in an area where their reception via such an antenna is unacceptable.⁴

ASkyB plans to change dramatically how satellite subscribers receive their local stations by offering the first satellite service that fully integrates local broadcast signals with national program services, just as cable offers to its subscribers. To date, technological limitations have prevented satellite carriers from delivering local signals to their customers. Technological improvements, pioneered by ASkyB, hold the key to providing local viewers with satellite-delivered access to their local stations. ASkyB plans to use a combination of traditional "full CONUS" satellites that beam signals across the entire continental United States and a revolutionary spot beam satellite that directs signals to a discrete geographic area. Full CONUS satellites necessarily deliver one signal per frequency to the entire continental United States. Spot beam technology will allow ASkyB to re-use the same frequency for different signals to be delivered to different parts of the United States. This provides the most efficient use of the spectrum allocated to us and maximizes our ability to deliver significant numbers of local broadcast signals to most American homes.

If our proposed transaction with EchoStar is consummated, our current projection is that we will be able to offer a service that includes satellite-delivered retransmission of local television stations to about 75% of the U.S. population. This percentage is a projection; we are on the cutting edge of a new technology and believe that this figure is a good estimate. By the end of 1997 our goal is for 25 to 30% of U.S. households to have access to their local broadcast stations via ASkyB's satellite service. That figure is expected to reach 50% by mid-1998 and to hit the 75% level by late 1998. With respect to the remaining 25% of the population, we plan to install for our customers an off-air antenna along with the satellite dish and a new converter box that features two tuners—one for satellite frequencies and one for terrestrial broadcast frequencies—allowing viewers to move seamlessly between satellite and off-air channels. All ASkyB customers, regardless of the size of the market in which they live, will receive an electronic on-screen program guide that includes the program schedules of local stations. Our service will fully integrate local stations without requiring subscribers to use a clumsy A/B switch. Thus our satellite customers, even in markets where satellite delivery of local signals is not now economically or technologically feasible, will be able to use a single remote control to click on channel 6 to receive the local channel 6 news through an off-air antenna and then click on channel 313 to view a premium movie service through the satellite dish. Not only will there be no need to rely on the A/B switch, our

⁴ For a discussion of the ineffectiveness of the A/B switch, see, *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 1997 U.S. LEXIS 2078 at 71 (March 31, 1997).

advanced electronic program guide will provide users with up-to-date accurate scheduling information for all channels—satellite and local alike.

B. A Cable-Dominated Marketplace.

The absence of local broadcast stations in their channel lineups handicaps satellite carriers because these local signals carry the programming that consumers most want to see. It is widely accepted, indeed, emphasized by our competitors in the cable industry, that the primary reason that satellite carriers have not succeeded fully in competing with cable systems is that satellite carriers have not, until now, had the ability to deliver local signals to local audiences.⁵ ASkyB's new service will accomplish precisely that, thus providing subscribers a mechanism for receiving razor sharp pictures of most or all of their local signals, together with a far larger number of specialized services than any cable system can provide today. AskyB plans to offer this service at a price that we believe will be fully competitive with a cable subscription.

On the other hand, without local station offerings we are not a true substitute for a cable service and we will not be nearly as effective in penetrating a marketplace that remains dominated by the cable industry despite repeated efforts by the federal government over the past decade to foster real competition.

Congress has repeatedly sought to provide competition in the MVPD marketplace.⁶ That this worthy goal has not been achieved is clear from the fact that all competitors with cable—SMATV, MMDS, telephone-delivered-video, C-Band services, and Ku-Band services—have obtained a combined market share over the past decade of only approximately 11% of

⁵ TCI, the nation's largest cable company, recently launched an advertising campaign in which it underscored the fact that DBS carriers cannot deliver local signals. "Buy the Dish Network and Your Local Forecast Is Out the Window," Rocky Mountain News, July 28, 1996 at 43-A.

⁶ See, e.g., the 1988 and 1994 Satellite Home Viewer Acts, the Cable Television Consumer Protection and Competition Act of 1992 and, most recently, the Telecommunications Act of 1996.

multichannel subscribers.⁷

In addition, cable's near monopoly status gives it the power to raise prices faster than the consumer price index;⁸ power that would not, economists teach us, exist in a truly competitive market. Moreover, last year TCI raised its prices an average of 13.5% and is expected to tack on a 6.8% nationwide increase in June.⁹ Competition in the multichannel video programming distribution marketplace is insufficient to act as a constraint on cable price increases. That cable rates continue to rise, despite the presence of MMDS, SMATV, phone companies and satellite carriers in the market is telling.

ASkyB hopes to change all this. In our view, the key to leveling the playing field is for satellite carriers to provide a service that is a complete, not a partial substitute for cable, at competitive prices. The inclusion of local broadcast stations in satellite channel line-ups will provide cable operators with their first taste of real competition in the marketplace.

C. Localism.

As Congress has made clear, access to local signals is a desired result, not only from an individual consumer's perspective, but also from a public policy standpoint. Coverage of local news, political events, sports, and entertainment helps inform a local community and bind it together. Likewise, local advertising permits informed consumers to make choices and shop in the marketplace immediately surrounding their homes and

⁷ Today, cable dominates the Multichannel Video Programming Distribution ("MVPD") arena and, in turn, a handful of Multiple System Operators ("MSOs") dominate the cable industry itself. Cable has a 88.7% share of MVPD subscribership (63.5 million out of 71.6 million) and together the two leading MSOs, TCI and Time Warner, approximately 47% of all cable subscribers (and about 41% of all MVPD subscribers). See, Annual Assessment of the Status Competition for the Delivery of Video Programming, FCC CS Do Docket No. 96-133 (Released January 2, 1997), Appendix F, and Table 2, respectively, ("1996 FCC Video competition Report").

⁸ See, Television Digest, April 21, 1997, where it was noted that over the past twelve months cable rates jumped 8%, while overall CPI was up only 2.8%.

⁹ See "TCI to Hike Cable Rates," Chicago Sun-Times, March 14, 1997 at 1, and McConville, "TCI Hikes Rates with Nod to DBS," Electronic Media, Mar. 17, 1997 at 3.

offices. Until now, to receive local stations, satellite subscribers have been compelled to maintain either a rooftop (or rabbit ears) antenna system, or continue subscribing to cable. Our goal is to end all that. When ASkyB comes to market, its subscribers will be able to receive local signals as part of ASkyB's service.

**III. THE GEOGRAPHIC AREA IN WHICH LOCAL STATION
RETRANSMISSION BY SATELLITE SHOULD BE PERMITTED UNDER
THE §119 COMPULSORY LICENSE**

We urge the Copyright Office to recommend that Congress revise §119 to define the "local commercial television market," within which a satellite carrier may retransmit local signals pursuant to the compulsory license. Instead of relying, as does present law, on a Grade B contour, this definition should be based upon the market determinations made by the FCC that delineate the geographic scope of the cable compulsory license under §111.

This approach will eliminate the current complex and cumbersome distribution pattern, which utilizes the predicted Grade B contour and serves neither satellite carriers, local stations nor consumers. This contour defines the geographic area in which, according to engineering principles that were developed in the 1950s, it is predicted that an originating station can transmit a broadcast signal of at least a certain intensity.¹⁰ Using Grade B contours to limit the area in which satellite carriers can retransmit local signals results in a highly cumbersome, inefficient system of local carriage. It will require ASkyB to deliver local broadcast signals in a crazy-quilt, overlapping manner based on the predicted reach of every network affiliate's over-the-air signal. It ignores the parameters of the actual market area for which a station sells advertising, acquires program rights, provides local news coverage and attracts viewers. Moreover, it will limit ASkyB's ability to compete with cable in homes that are located within a station's commercial market, but outside its predicted Grade B contour. Worse yet, use of Grade B contours to govern local signal carriage would *compel* the delivery of out-of-market affiliates from adjacent markets.

Our suggested approach is more equitable, more rational, and will also help to solve the thorny problems that have arisen with respect to the

¹⁰ Apart from the fact that "predicted" Grade B contour engineering is woefully outdated and fails to take into account the real-world terrain and interference factors that can affect reception of a broadcast signal, it will become obsolete with the advent of digital terrestrial broadcasting. With digital broadcasting, a person tuning in an over-the-air signal will either receive it with crystal clarity or will not be able to receive it at all.

enforcement of the "white area" restrictions of the Satellite Home Viewer Act. Since most subscribers would rather watch their local stations than a station imported from a distant market, the number of homes choosing to subscribe to a package of satellite-delivered distant network station signals is bound to decline, as will challenges from stations who believe the "white area" restrictions are being violated and complaints from consumers deprived of satellite-delivered distant network signals.

IV. THE NEED FOR COMPULSORY LICENSE PARITY.

ASkyB is participating in the current CARP satellite ratemaking proceeding for the sole purpose of establishing that, as long as §119 is in force, the only appropriate rate satellite carriers should pay for the retransmission of local broadcast signals to local audiences is zero. The appropriateness of a zero rate for retransmissions of local broadcast signals was self-evident to the drafters of the 1976 Copyright Act. Congress has expressly provided in §111 a statutory rate of zero for the local retransmission of local signals by any carrier eligible for the license under §111. Inasmuch as this zero rate is fixed in the statute, it is unreviewable by any CARP; it can only be altered by Congress.

We believe, on both policy and economic grounds, that satellite retransmission requires precisely the same treatment: we urge Congress to amend title 17 expressly to provide a zero compulsory license rate for the retransmission, within local markets, of local broadcast signals by satellite carriers, and to ensure that such rate is unreviewable by any CARP. First, and most important, copyright owners license their works to broadcasters for broadcast throughout an entire local market. This means that they have been paid for the performance of their work, by transmission, to *all* the "eyeballs" within a local market. Copyright owners assiduously extract as much money as they can in these negotiations, and do so with the clear knowledge—not just some hypothetical assumption—that they have been paid for the entire market.

Thus, when any MVPD delivers local broadcast signals to local eyeballs, no copyright consequences arise. For example, when an individual views M.A.S.H. on WTTG (channel 5 here in Washington), whether she chooses to watch it (a) off the air, (b) off the cable system, or (c) off of her newly-acquired satellite dish is a matter as to which the copyright law is and should be indifferent. When Channel 5 obtains the rights to deliver M.A.S.H. to all of the viewers in the Washington market, it has bought permission to perform M.A.S.H. throughout the Washington market; it should make no difference whether a customer receives it via an antenna, cable wire, or satellite dish.

This local retransmission scenario is unrelated to the questions of whether and how copyright owners should be compensated for the retransmission of *distant* broadcast signals by cable systems. If, for example, a cable system in Ohio decided to retransmit Channel 5 from Washington, that would be an event of substantial copyright impact and consequence because:

- either the scope of the Washington license would be grossly exceeded (because the Ohio viewers had not been encompassed in the negotiations for the licensing of the Channel 5 broadcast), or
- the owner of broadcast rights to M.A.S.H. within that particular Ohio market would lose the benefit of his bargain with the owners of the copyright in M.A.S.H. because he paid for exclusivity that has been undermined.

For both of those reasons, it is entirely appropriate that the copyright owner be fairly compensated for the delivery of Channel 5's signal into a *distant* market—either under a compulsory license if it is retained or, if it is abolished, pursuant to a private contract.

In a recent hearing before the Senate Commerce Committee, Senator Burns used a phrase we think is appropriate in considering the proper rate for satellite carriers to pay for the local delivery of local signals: "competitively neutral."¹¹ As that phrase suggests, the establishment of a zero rate for satellite carriage of local signals is the only rate that would not have the effect of favoring either the cable or the satellite component of the MVPD industry. That is, if we are required to pay a rate greater than zero—notwithstanding the fact that this would amount to double payment for copyright owners—we will be unable to compete as effectively with cable systems as if we faced the same rate that they do. We are not asking the Copyright Office or the CARP or the Congress to provide satellite carriers with something "special" or "extraordinary." We are simply asking that we

¹¹ *Hearing on Multi-Channel Video Competition before the Senate Committee on Commerce, Science, and Transportation, 105th Cong., 1st Sess. 8 (unofficial transcript) (statement of Senator Burns).*

be treated equally so that we may compete on a level playing field. We are more than willing to take our chances in that market.

V. REGULATORY PARITY.

Much has been or will be made about the alleged "difference" between the positions of cable systems and satellite carriers with respect to the regulatory environment. ASkyB recognizes that it will have to satisfy certain regulatory requirements. However, we resist the argument that wholesale application of cable's current obligations is wise and appropriate. While some obligations imposed by the Communications Act and/or the FCC—such as syndex and sports blackouts—complement the copyright law, others—such as must carry and franchise requirements—are wholly irrelevant to copyright considerations.

We think that the proper approach was articulated by Senator McCain, Chairman of the Senate Commerce Committee:

I will say that I will not favor imposing rules on DBS where they either make no sense, as in the case of franchise fees, or where they might cripple DBS providers, as in the case of full must-carry.¹²

The Copyright Office should recommend and Congress should empower the Federal Communications Commission to determine which regulatory obligations should be made applicable to satellite carriers. Most important, we are prepared to set aside a record number of slots on our satellites for the retransmission of local signals without regard to whether such carriage is legally mandated. That said, there will necessarily be some difference in satellite "must carry" and that which applies to cable systems.

VI. LEGISLATIVE CLARIFICATION

ASkyB believes that §119 provides the statutory authority for satellite carriers locally to retransmit local broadcast stations to their subscribers.¹³ At the same time, it is important that Congress put to rest—once and for

¹² *Id.* at 5.

¹³ In this regard, this Office has stated that it "would not question the reporting of a network station that was retransmitted locally to subscribers." Letter from Marilyn J. Kretsinger, Acting General Counsel, to William S. Reyner, Jr., counsel for ASkyB, 15 August 1996.

all—the issue of local retransmissions under §119. This congressional action will silence those who have argued that such statutory authority does not exist today, and will allow satellite carriers to move forward and finally offer consumers a product that is truly competitive with that of the cable television industry.

VII. CONCLUSION.

ASkyB seeks four things from the legislation we hope to see enacted: (1) a statutory zero rate that will put us on a level playing field with cable and place that rate—just like the zero rate for cable—out of the jurisdiction of future ratemaking CARPs; (2) for purposes of retransmission of local signals, the “local commercial television market” should be defined so as to be consistent with the geographic determinations made by the FCC that govern the cable compulsory license under §111; (3) a directive to the FCC to determine which regulatory obligations should be imposed on satellite carriers in order to foster competition in the MVPD marketplace; and (4) reaffirmation and clarification that §119 authorizes satellite carriers to retransmit the signals of local television stations to subscribers residing in a station’s “local commercial television market.”

RM 97-1

No. 34

Before the
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Revision of the Cable and Satellite)
Compulsory Licenses)

Docket No. 97-1

ORIGINAL

**WRITTEN STATEMENT OF
THE NATIONAL CABLE TELEVISION ASSOCIATION**

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April 28, 1997

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**Before the
LIBRARY OF CONGRESS
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Washington, D.C.**

Revision of the Cable and Satellite)	
Compulsory Licenses)	Docket No. 97-1

**WRITTEN STATEMENT OF
THE NATIONAL CABLE TELEVISION ASSOCIATION**

The National Cable Television Association, Inc. ("NCTA"), in response to the Copyright Office Notice and Request for Comments dated March 20, 1997¹, hereby submits its written statement on the copyright compulsory licenses governing retransmission of broadcast signals.

NCTA is the principal trade association of the cable television industry in the United States. Its members include cable television systems serving over 80 percent of the nation's cable customers, and over 100 cable program networks engaged in creating and distributing a broad range of programming for viewers. We appreciate this opportunity to provide the Office with the cable industry's perspective on the compulsory license.

Cable systems retransmit broadcast stations to viewers pursuant to the copyright compulsory license established in Section 111 of the Copyright Act of 1976, which

¹ 62 Fed. Reg. 13396 (Mar. 20, 1997).

became effective in 1978. Since that time, cable systems have paid copyright owners **over \$2.3 billion** in royalty fees pursuant to the Act.²

For the most part, the compulsory license has worked well over all these years. It has balanced the dual goals of the copyright law: compensating copyright holders for the use of their works while ensuring the ready availability to the public of copyrighted material contained in local and distant broadcast signals. And it has achieved these goals in the manner that Congress intended -- facilitating the retransmission of copyrighted material without incurring the significant transaction costs and operational difficulties that would otherwise arise. While certain issues remain with regard to administration of the compulsory license (particularly with respect to the "contiguous system" and phantom signal issue, discussed below), we believe that the fundamental workings of the license are sound. The license continues to serve, and is still necessary to serve, its intended purpose.

Any review of the license must take full account of the context in which Congress established a compulsory copyright license for cable's retransmission of broadcast stations. Those origins lie in communications policy hammered out over 20 years ago and reaffirmed as recently as three weeks ago by the Supreme Court in the must carry decision.

² The total royalty fees received by the Office, as of April 18, 1997, are \$2,304,997,807.

Consequently, the Section 111 cable compulsory license, which confers a privilege on cable operators to retransmit programs contained on broadcast stations without the consent of the copyright holder, cannot be viewed in a manner divorced from this context. It was part of a compromise in which compliance with numerous communications regulations played an integral role. This compromise ensured the continued imposition of significant regulatory obligations on cable operators to protect local broadcasters and copyright owners.

A thoroughly different set of circumstances led Congress to adopt the compulsory license found in Section 119 of the Act, which governs the retransmission of broadcast stations by satellite carriers to unserved areas. Any attempt to "harmonize" the two licenses must also ensure that the communications policy attached to each is similarly balanced. For example, if a DBS provider competes with a cable operator by providing local broadcast signals, it must observe the *quid pro quo* of the compulsory copyright license. It should not be permitted to take advantage of the copyright privileges enjoyed by cable operators without incurring cable's numerous regulatory obligations, or without a reduction being made in cable's obligations.

I. THE CABLE COMPULSORY LICENSE

A. The Cable Compulsory License Should Be Retained

As the Office is aware, prior to adoption of the cable compulsory license, cable operators had **no** copyright liability -- and paid no fees at all -- for the retransmission of either local or distant broadcast signals. The United States Supreme Court twice

confirmed that the property rights granted to copyright holders by the Copyright Act of 1909 did not include the right to control or be compensated for cable retransmission of broadcast programming contained either in local³ or distant⁴ television signals. The 1976 Copyright Act imposed liability for the first time, but provided cable operators an important and limited right to retransmit broadcast stations without requiring the consent of copyright owners.

Congress' objectives in enacting the cable compulsory license were plain: create a mechanism to balance the interest of copyright owners in receiving compensation for the use of their works with the public's interest in continued access to local and distant broadcast programming via cable television. As the United States Supreme Court observed in 1984:

In devising this system, Congress has clearly sought to further the important public purposes framed in the Copyright Clause, U.S. Const., Art. I, Section 8, of rewarding the creators of copyrighted works and of "promoting broad public availability of literature, music, and other arts." ... Compulsory licensing not only protects the commercial value of copyrighted works but also enhances the ability of cable systems to retransmit such programs carried on distant signals, thereby allowing the public to benefit by the wider dissemination of works carried on television broadcast signals.⁵

The compulsory license facilitates the cable industry's ability to provide the public with improved broadcast reception (in the case of local signals) and increased diversity (in the

³ Fortnightly Corp. v. United Artists Television, 392 U.S. 390 (1968).

⁴ Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 U.S. 394 (1974).

⁵ Capital Cities Cable, Inc. v. Crisp, 476 U.S. 709 (1984) (citations omitted).

case of distant signals). The compulsory nature of the license is the only practical means of ensuring that the viewing public will not be deprived of programming that they have long enjoyed. At the same time, the fees required to be paid under the license currently provide copyright owners with nearly \$172 million annually.⁶

During the lengthy process that led to adoption of the copyright laws in 1976, Congress specifically considered and rejected conventional copyright liability for cable's retransmission of broadcast programming. As early as 1965, the Register of Copyrights acknowledged in a Report to Congress that "a particularly strong point on the CATV side is the obvious difficulty, under present arrangements, of obtaining advance clearances for all of the copyrighted material contained in a broadcast. This represents a real problem that cannot be brushed under the rug, and it behooves the copyright owners to come forward with practical suggestions for solving it."⁷ Congress ultimately concluded that "it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system."⁸ It adopted a compulsory license for cable television.

⁶ Copyright Office data (based on receipts as of April 18, 1997, for both 1996 accounting periods).

⁷ Register of Copyright's Supplemental Report (1965) at 42.

⁸ H.R. Rep. No. 94-1476, 94th Cong. 2d Sess. 89 (hereinafter "1976 House Report").

**B. Conditions Warranting Creation of the Compulsory License
Have Not Changed**

The Copyright Office's Notice asks whether the conditions that led to creation of the cable compulsory license continue. In our view, the compulsory license is still necessary to avoid these significant transaction costs and practical difficulties with obtaining clearance for every program carried on every broadcast station on a cable system. There has been no evidence over the 20 years since the compulsory license was adopted that any other mechanism would be as efficient and would ensure the continued availability of programming to the public.

The logistical and transactional problems that gave rise to the compulsory license have not lessened over time. Since 1976, the number of cable systems in operation has nearly tripled, from 3,681 to almost 11,000 today.⁹ At the same time, the number of commercial television stations has more than doubled, growing from 706 stations in 1976 to over 1,500 stations in 1997.¹⁰ Cable systems carry, on average, about 9 local signals and 3 distant signals.¹¹

In the absence of the license, negotiations would be required to obtain clearances for all the programs carried (in many cases 24 hours a day) on each of these stations -- a Herculean task, even for large systems. Every cable system in the United States would be

⁹ NCTA, Cable Television Developments (Spring 1997) at 4 (as of January 1, 1997).

¹⁰ Broadcasting and Cable (March 31, 1997) at 87.

¹¹ Cable Data Corporation, based on Copyright Data for Accounting Period 1996-1 (Mar. 1997).

forced to anticipate the programming that would be shown, identify the appropriate owner of the copyrighted works, negotiate for the rights to retransmit those works, and acquire the personnel and equipment to black out programming for which rights could not be obtained. And unlike cable networks, which have rights to authorize the nationwide carriage of their networks' programming, broadcasters may not have rights to authorize the retransmission of the works that make up their broadcast day.

Aside from the practical problems involved, resort to the "free marketplace" to govern signal carriage is not appropriate at this juncture. The carriage of broadcast stations by cable can hardly be characterized as a free market. For example, FCC regulations govern in intricate detail the extent to which, and the manner by which, cable operators may retransmit broadcast stations.¹² Every local television station can demand that a cable operator carry its signal, in its entirety, on a specified channel. Every local station has the right to demand that an operator black out various programs from more distant stations. Moreover, FCC rules restrict the area for which broadcast stations may acquire exclusive programming rights.¹³ And, more fundamentally, the FCC allocated broadcast stations locally throughout the country long ago, leaving some areas without a full complement of local stations and other areas with a multiplicity of local outlets. Relying on negotiations for licensing broadcast programming under these circumstances

¹² See e.g., 47 C.F.R. §§76.56 (signal carriage obligations); 76.57 (channel positioning right for local stations); 76.62 (rules detailing manner of carriage of television stations).

¹³ 47 C.F.R. §73.658(b) (territorial exclusivity rule).

as if a free market existed, therefore, is not a realistic alternative. Continuation of the compulsory licensing remains necessary under these circumstances.

C. The Office Should Modify its Treatment of "Contiguous Systems"

While we believe the compulsory license still serves a valuable purpose, one change in administration of the cable compulsory license to accommodate contiguous cable systems is clearly warranted. The Office's Notice asks whether the compulsory license "should be amended to reflect the significant amount of mergers and acquisitions in the cable industry?"¹⁴ The Office has been examining the need to clarify its policies with respect to merged cable systems since 1989. The Office should promptly conclude that examination, and adopt a more equitable mechanism for computing royalties for such systems.

The need to resolve the treatment of contiguous systems has heightened over the years. Cable systems for several years have pursued a strategy of "clustering" systems in relatively close proximity to each other. An FCC Report on Competition to the Cable Industry issued in 1997 found that cable systems during 1995 "continued their trend towards creating large regional system clusters" and noted that the number of clusters of systems serving at least 100,000 customers increased to 137 by the end of that year.¹⁵ An appropriate resolution of the calculation of copyright royalties to ensure that copyright

¹⁴ Notice, at 13399.

¹⁵ Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 96-133 (Jan. 2, 1997) at ¶137.

law does not artificially impede operators' ability to provide improved service to the public is critical at this juncture.

In particular, the Office should adopt rules to avoid artificially attributing program services offered by cable systems that are separate for all intents and purposes but for their sharing of a common boundary. We urge the Office to revise its interpretation of the Copyright Act's contiguous system provision and to allow creation of subscriber groups and allocation of gross receipts on a community-by-community basis to reflect the actual receipt of signals in that community.¹⁶

Such a policy entirely aligns with the Copyright Act. The Act states that "[f]or purposes of determining the royalty fee [under the compulsory license], two or more cable systems in contiguous communities under common ownership or control or operating from one headend shall be considered as one system."¹⁷ This definition was designed to prevent cable operators from "artificially fragmenting" their cable systems in order to reduce their royalty payments.¹⁸ But the Office's preliminary interpretation of the calculation of royalties in the case of merged systems results in an artificial consolidation of systems not based in the real world of program offerings, that cannot be squared with the reality of signal carriage within these systems. The Office's "phantom

¹⁶ See Comments of the National Cable Television Association, Inc., Docket No. RM 89-2 (Dec. 1, 1989); Reply Comments of the National Cable Television Association, Inc., Docket No. RM 89-2 (Dec. 29, 1989).

¹⁷ 17 U.S.C. §111(f).

¹⁸ See Notice of Final Regulations In Docket No. 77-2, 43 Fed. Reg. 958 (1978).

signal" policy forces operators to pay for distant signals as if they are carried to all subscribers of commonly owned systems located in contiguous communities, even where that is not the case.

The Copyright Act does not compel this unfair result. Under similar circumstances, the D.C. Circuit previously found that the Office has ample authority to interpret the Act so long as it is not inconsistent with Congressional intent: "Congress recognizes that it can only legislate, not administer, so it necessarily relies on agency action to make 'common sense' responses to problems that arise during implementation, so long as those responses are not inconsistent with congressional intent."¹⁹ In short, the Office can and should fashion fair rules to deal with systems that span several communities that may carry different complements of signals. These rules can fairly compensate copyright owners as well as ensure that operators are not penalized for acquiring contiguous systems.

If the Office concludes that the statute compels a contrary approach, however, only a narrow amendment would be required to fix this discrete problem. Should it believe amendment of the Act is necessary, the Office should propose that Congress allow a community-by-community calculation of royalties and signal carriage to ensure the equitable result that copyright owners are properly compensated for use of their works.

¹⁹ Cablevision Systems Development Co. v. Motion Picture Association of America, 836 F.2d 599, 612 (D. C. Cir.), cert. denied, 487 U.S. 1235 (1988).

This calculation should be based on the distant signals that cable customers actually receive and pay for.

D. Modification of the Cable Compulsory License Royalty Fee Structure

The Notice also asks whether the compulsory license should be modified to eliminate reliance on certain outdated FCC rules for determining copyright liability. Some have proposed that the percentage of revenues approach currently in Section 111 should be replaced by a flat fee royalty, similar to that contained in the Satellite Home Viewer Act ("SHVA").²⁰

Efforts to establish a flat fee per signal for the cable carriage of broadcast signals have been made over the years. NCTA's experience in past discussions regarding a flat fee approach suggests that any such change raises difficult issues of its own. For example, even a "revenue-neutral" revision of the royalty rates could cause substantial increases in the fees currently paid by small cable systems. Often located in sparsely populated areas with few local television stations that deliver a good picture over the air, these systems provide customers with a wide array of valuable television signals. They also provide a service to the local broadcaster, extending its reach and improving picture quality through the use of cable. Congress recognized the special circumstances faced by

²⁰ Notice at 13399.

small cable systems when it adopted a flat rate approach for them that is not tied to the number of distant signals carried.²¹

Applying the SHVA per subscriber per signal royalty concept to small cable operators could cause a significant increase in royalty payments. This increase in turn could lead to a loss of valuable service for more rural customers that lack the variety of over-the-air options found in major television markets. That would undermine one of the key purposes of the compulsory license, maximizing public access to creative works.

Furthermore, the Copyright Act prescribes five-year intervals when rate adjustments can occur. By agreement, no proceedings have been instituted to adjust rates during the last several intervals. Any changes leading to a new royalty schedule, therefore, should not increase the royalties cable operators pay, assuming the same amount of signal retransmission.

In addition, any proposal to move to a flat fee approach also raises the issue of whether and how to factor in carriage of additional distant signals. Operators now face a 3.75% penalty rate for carriage of distant signals in excess of the quota permitted under the FCC's former distant signal rules. This rate substantially exceeds the existing statutory rates for carriage of so-called "permitted" distant signals. Efforts to "simplify"

²¹ 1976 House Report at 96-97. ("Because many smaller cable systems carry a large number of distant signals, especially those located in areas where over-the-air television service is sparse and because smaller cable systems may be less able to shoulder the burden of copyright payments than large systems, the Committee decided to give special consideration to cable systems with semi-annual gross receipts of less than \$160,000 (\$320,000 annually)").

the license will inevitably cause the Office or Congress to revisit the difficult policy choices that led to the royalty fees in effect today -- with little assurance that a simpler or fairer or better policy result will emerge from the effort.

NCTA is skeptical that the problems associated with moving to a flat fee system can be resolved in the future in a manner that truly would simplify calculation of rates under the cable compulsory license and would remain revenue-neutral. In any event, we believe the burden is on proponents of a change to demonstrate that any modification is warranted and, most importantly, can be accomplished without undoing the delicate balance of interests reflected in the existing law.

**E. The Cable Compulsory License and Communications Policy
Are Inextricably Entwined**

The Copyright Office's comprehensive Report to Congress²² five years ago recognized that extending the privilege of the compulsory license to cable operators was inextricably tied to communications policy and judicial decisions: "The license represents an amalgamation of FCC communications policy and regulation, Supreme Court action, copyright policy compromises, and legislative initiative."²³ The Copyright Act amendments in 1976 only arose after the FCC several years earlier adopted significant regulatory restrictions on cable's carriage of broadcast stations. These

²² "The Cable and Satellite Carrier Compulsory License: An Overview and Analysis", A Report of the Register of Copyrights (March 1992) (hereinafter "Copyright Office Report").

²³ *Id.* at 5.

included must carry rules, distant signal rules, syndicated exclusivity, sports black-out, and network non-duplication rules.²⁴

The D.C. Circuit aptly characterized the chain link between communications policy and the copyright laws regarding cable retransmission of broadcast stations:

[T]he 1976 Congress did not imagine copyright law and communications law to be two islands, separated by an impassable sea. Rather, Congress was aware of the interplay between copyright and communications law, and knew that the FCC would have a role to play in determining the scope of compulsory licensing. Congress intended that the Commission's communications policy decisions concerning which signals cable television could carry would affect the copyright liability of cable television companies.²⁵

This link is made explicit in the House Report accompanying the Copyright Act:

[A]ny statutory scheme that imposes copyright liability on cable television systems must take account of the intricate and complicated rules and regulations adopted by the Federal Communications Commission to govern the cable television industry. While the Committee has carefully avoided including in the bill any provisions which would interfere with the FCC's rules or which might be characterized as affecting "communications policy", the Committee has been cognizant of the interplay between the copyright and the communications elements of the legislation.²⁶

More recently, in its deliberations surrounding reimposition of must carry requirements in the 1992 Cable Act, Congress reiterated the connection between the compulsory license and communications policy, finding that "[t]he ability of cable systems to retransmit local

²⁴ Cable Television Report and Order, 36 F.C.C.2d 143 (1972). A consensus agreement reached between representatives of the cable, broadcast and copyright industries paved the way for copyright legislation. See id., Appendix D; Copyright Office Report at 18-21.

²⁵ United Video, Inc. v. FCC, 890 F. 2d 1173, 1184 (D.C. Cir. 1989).

²⁶ 1976 Act House Report at 89.

programming without copyright liability and without any responsibility to carry a complement of such signals on reasonable conditions is both unfair and inconsistent with the balance contemplated when the compulsory license was adopted."²⁷

The interplay between copyright and communications policy is reflected in the terms of the compulsory license itself. A cable operator is only eligible for the compulsory license to retransmit broadcast stations if carriage of the stations is permissible under the FCC's rules.²⁸ The dividing line between a local and distant signal for copyright purposes is determined by the area in which a commercial television station would be entitled to must carry status under the FCC's rules.²⁹ In addition, the copyright royalty rates for carriage of television stations are directly tied to the operation of FCC rules. For example, pursuant to Section 801(b)(2) of the Copyright Act, copyright royalty rates were adjusted after the FCC changed its distant signal and syndicated exclusivity rules. Any changes to the FCC's sports blackout rules also would trigger a Copyright Office evaluation of whether the copyright royalty rates should be modified.³⁰

In short, copyright and communications policy are inextricably intertwined in the workings of the cable compulsory license. This was true at its inception. It is true in its operation today. The appropriateness of extending the privileges of the cable copyright

²⁷ H.R. Rep. No. 92-628, 102d Cong., 2d Sess. 63 (1992); see also *id.* at 48.

²⁸ 17 U.S.C. §111(c)(2)(a).

²⁹ *Id.* §111(f) (definition of "local service area of a primary transmitter.")

³⁰ *Id.* §801(b)(2)(c).

compulsory license to entities other than cable -- such as DBS operators that retransmit local signals within their local market -- cannot be fairly evaluated without an appreciation of the responsibilities that attach to the cable license through communications policy decisions. As described below, an entirely different set of considerations motivated Congress to adopt the Satellite Home Viewer Act. Absent imposition of these same regulatory constraints on DBS operators that deliver local broadcast stations (or removal of these restraints on cable), there would be no parity in treatment under either the copyright or communications laws. The regulatory balance, struck by Congress in 1976, would be undone.

II. RETRANSMISSION OF LOCAL BROADCAST STATIONS BY SATELLITE

The Notice raises the issue of whether satellites should be permitted to retransmit local network affiliates within their local service area to satellite dish owners.³¹ The copyright laws currently do not permit this activity, either under Section 111 or Section 119.³²

In adopting a new satellite compulsory license in 1988, Congress resolved in the negative the issue of whether satellite carriers could avail themselves of the Section 111

³¹ Notice at 13399.

³² We recognize that the Copyright Office issued a letter in response to a request for declaratory ruling regarding §119, stating that it "[w]ould not question the reporting of a network station that was retransmitted locally to subscribers." Letter from Marilyn J. Kretsinger, Acting General Counsel, to William S. Reyner, Jr. (August 15, 1996). However, the Office made clear that it was not resolving the substantive rights of copyright owners or users. *Id.*

cable compulsory license.³³ The SHVA is explicit that the cable compulsory license of Section 111 cannot be construed to "[c]ontain any authorization, exemption, or license through which secondary transmissions by satellite carrier for private home viewing of programming contained in a primary transmission made by a superstation or a network station may be made without obtaining the consent of the copyright owner."³⁴ Therefore, while cable operators may retransmit local signals at no direct charge under Section 111,³⁵ this rate conclusion has no bearing on whether a DBS operator could do the same.

The genesis of Section 119 belies the notion that it can somehow be construed to authorize a new compulsory license to provide the retransmission of local signals at no charge to satellite dish owners. SHVA arose out of a concern that viewers in areas that lacked local broadcast signals, either over the air or delivered via their local cable system, would be unable to obtain access to a diverse array of broadcast offerings, particularly the major networks' signals.³⁶ The House Report explained the need for this legislation:

³³ The Copyright Office reached the same conclusion in its examination of §111. 57 Fed. Reg. 3284 (Jan. 29, 1992).

³⁴ 17 U.S.C. §119(e).

³⁵ It has erroneously been asserted that cable operators make no payment for retransmitting local signals. Operators pay a minimum fee for the privilege of using the §111 compulsory license -- even if no distant signals are carried. An operator that retransmits only local stations therefore still pays a royalty fee. 17 U.S.C. §111(d)(1)(B)(ii).

³⁶ See, e.g., 2 Nimmer on Copyright §8.18[F] [1] ("[s]ome households are located in 'white areas' ... i.e., locations 'that cannot pick up ... signals through a rooftop antenna or a cable because they are far from the big cities, or in some cases just on the wrong side of the mountain.") (quoting 134 Cong. Rec. S16975 (daily ed. Oct. 20, 1988) (statement of Sen. Leahy).)

"despite the explosion in recent years of new technologies and outlets delivering video programming, millions of Americans are still not sharing in the programming bounty available from broadcasters or over cable systems."³⁷ Congress in the SHVA thus granted "[a] limited interim compulsory license for the sole purpose of facilitating the transmission of each network's programming to 'white areas' which are unserved by the network."³⁸ It is impossible to square that narrow intent -- and the detailed statutory scheme embodied in Section 119 -- with congressional approval of satellite local signal retransmission at no charge.

NCTA has no objection to a time extension of the SHVA according to its existing terms. But those terms do not permit its use for any purpose other than the narrow one that Congress intended. Permitting satellite carriers to retransmit local broadcast stations to their own markets would not constitute a "clarification" of the license. Such action would be a significant revision that would fundamentally change its purpose. Such a wholesale revamping of the license elevates the significant questions regarding the parity of treatment -- or lack thereof -- between cable and DBS operators who wish to retransmit local signals.

It has been suggested that because cable operators can avail themselves of the cable compulsory license for local signal carriage, DBS operators should be permitted to

³⁷ H.R. Rep. No. 100-887, 100th Cong., 2d Sess. 14-15 (1988).

³⁸ *Id.* at 19 (emphasis supplied).

do so on the same terms as well.³⁹ As noted, this simplistic analysis ignores the link between the privilege of cable's compulsory license as an exception to the general rights of a copyright holder and the very real regulatory obligations associated with invoking this right, a link that is crucial to understanding the compulsory license.

The current differences between cable and DBS are striking in this regard. Most significantly, unlike DBS operators, cable operators with more than 36 channels must carry all local broadcast stations in a market requesting carriage. DBS operators, in contrast, would currently remain free to pick and choose which local stations they wish to carry, if any. Cable's obligation to carry all local stations demands a copyright compulsory license for carriage of those signals.

In addition, television stations (other than superstations) must be carried by cable operators on a basic tier that must be sold to all customers before they can buy any other service.⁴⁰ In the copyright context, this 'must buy' requirement ensures that copyright owners receive a payment reflecting the entire customer base of a cable systems, even if no distant signals are carried. DBS operators, by contrast, have no obligation to provide broadcast signals on a basic tier and have no minimum fee obligations.

³⁹ See, e.g., Docket 96-3, CARP-SRA, Direct Written Testimony of American Sky Broadcasting (Dec. 2, 1996) at 7-9 ("To provide meaningful competition to cable systems, DBS operators must be permitted to carry local stations and would be greatly disadvantaged in their ability to compete if such carriage is not under the same terms as cable (i.e., without having to pay a copyright fee).")

⁴⁰ 47 U.S.C. §534(b)(7) (requiring all local signals to be provided to every cable system customer); *id.* §§43(b)(7) (requiring all television signals other than superstations to be provided on a basic service tier that all customers must buy).

Cable operators face a host of communications obligations that do not apply to DBS operators in addition to must carry requirements designed to protect local broadcast stations in their own markets. Network non-duplication, syndicated exclusivity, and sports blackout protection all were integral parts of the regulatory compromise that led to the cable compulsory license and remain in effect today. The FCC's former distant signal rules restricted the number of distant signals that could be carried; its repeal led to a 3.75% copyright penalty rate on cable carriage of any additional distant signals in excess of those former quotas.

The extension of the cable compulsory license to MMDS and SMATV does not alter this conclusion. Issues regarding MMDS's and SMATVs' eligibility for the compulsory license focused on the retransmission of distant signals, not local stations available over-the-air via a master antenna. Moreover, during the nearly ten-year-long constitutional challenge to cable must-carry requirements, the rule itself was in some doubt. Now it is the law of the land.

Finally, it is only recently that digital MMDS has become a viable technology. In short, circumstances have changed since Congress gave MMDS its license, and it is far from clear that Congress would reach the same result vis-a-vis MMDS' (or SMATVs') entitlement to the compulsory license, unencumbered by broadcast signal obligations, in today's environment.

Provision of local broadcast service via DBS also raises competitive parity issues that may go beyond the Copyright Office's jurisdiction but which bear on any

recommendation on amendments to the compulsory license. These issues constitute part of the larger issues raised before Congress and the Federal Communications Commission⁴¹ concerning regulatory parity. These issues include, for example, whether a DBS provider retransmitting local broadcast stations should be subject to the same media ownership restrictions and program access requirements, leased and PEG access obligations, local taxation provisions, and the wide variety of other obligations placed on cable systems, or whether these obligations should be eliminated for all multichannel video providers.

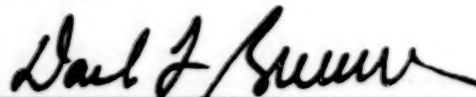
In short, the ability to retransmit local broadcast stations pursuant to a compulsory license is only one side of the equation. Allowing "local" DBS providers to avail themselves of the compulsory license for local signal carriage, without imposing the other obligations that cable operators face, would create an unfair competitive imbalance between cable and its competitors. This disparity would be wholly inconsistent with the principle of regulatory parity, and would need to be addressed simultaneously with any modification of the existing compulsory licensing scheme.

⁴¹ See, e.g., NCTA Comments in FCC MM Docket No. 93-25 (filed Apr. 28, 1997) (addressing public interest requirements for DBS).

III. CONCLUSION

For the foregoing reasons, NCTA respectfully requests that the Office adopt recommendations to Congress consistent with its Comments herein.

Respectfully submitted,



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April 28, 1997

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In the Matter of

REVISION OF THE CABLE AND SATELLITE
CARRIER COMPULSORY LICENSES

Docket No. 97-1

**WRITTEN STATEMENT OF FRITZ ATTAWAY ON BEHALF OF
MOTION PICTURE ASSOCIATION OF AMERICA, INC.**

I am Fritz Attaway, Senior Vice-President, Government Relations and Washington General Counsel of Motion Picture Association of America, Inc. ("MPAA"). These comments are submitted on behalf of MPAA in response to the issues raised in the Copyright Office's *Notice*, 62 Fed.Reg. 13396 (March 20, 1997), in this docket.

The questions presented by the Copyright Office raise exceedingly complex issues of law as well as of the marketplace. In the relatively short time since the Copyright Office's *Notice* was issued, MPAA has made every effort to provide responses that will contribute to the discussion and assist the Copyright Office in completing its assignment. However, because of the complexity of the issues and brief time afforded to prepare these comments, MPAA must reserve the right to clarify or to amend its positions in the light of further considerations and comments made by other parties.

EXECUTIVE SUMMARY OF MPAA'S POSITION

Compulsory Licenses Are Not Needed In Today's Market

MPAA continues to believe that free market negotiations, not compulsory licensing, should be the means by which all programming,

including retransmissions of broadcast station programming, is made available to the viewing public. Today's video program marketplace differs greatly from the marketplace that existed when the current compulsory licenses were put into place. Regulatory constraints have been loosened, small "mom and pop" cable operations have grown into large multi-faceted conglomerates, and viewers have a plethora of programming choices.

The primary reason for creating the compulsory licenses -- minimizing burdensome transaction costs -- has been overtaken by events. The ability of cable networks to obtain programming via market negotiations demonstrates convincingly that private transactions can effectively and efficiently bring large amounts of programming to the viewing public.

In sum, the justifications of a past era have lost their force in today's circumstances.

Conditions For Continuing The Compulsory Licenses

Notwithstanding that the grounds on which the compulsory license were built have long since eroded, MPAA recognizes that an abrupt end to the existing licenses might cause economic dislocation. To avoid such dislocation, MPAA proposes that, if the licenses are to be ended, they be phased out over a transition period.¹

¹ The sunset could occur on a date certain or it could be phased in gradually. One possibility would be for a transition to occur simultaneously with the transformation from analog to digital broadcasting by individual television stations.

If compulsory licenses are to be continued over a transition period, several aspects of the present system must be updated and streamlined. First, the cable royalty rate plan must be simplified. Second, the transition compulsory license should apply equally to all entities retransmitting broadcast signals ("retransmitters"). Third, must carry and other communications policy rules must be clearly identified and should apply on comparable terms among retransmitters. Finally, the remedies provisions should be strengthened for violations of the compulsory license plan.

Restructuring the Cable Royalty Plan

Little good can be said about the present cable royalty payment plan. It involves a complicated maze of requirements, many of which are tied to arcane and long-since deleted FCC rules. It has unduly influenced tiering and pricing decisions. It has spawned considerable dispute and debate, including lengthy rulemakings and federal court litigation. It has neither the design nor the flexibility to adapt easily to changing conditions and new entrants in the industry since 1976.

Given the difficulties attendant to the present cable royalty payment plan, any new transitional compulsory license must begin with a restructured royalty scheme. As compared to current cable royalty plan, the objectives of a new plan must be (1) to simplify the rate payment structure and (2) to set rates that reflect current market realities, not a 1976 political compromise.

With regard to simplification, the Section 119 structure of a monthly per subscriber rate for each signal retransmitted seems to be a practical and efficient approach to reporting and payment. With regard to setting rates, multiple factors affect current market conditions, but using the criterion of fair market value offers a valid benchmark for determining reasonable, market-based rates. This criterion should be used to set any new rates and as the determinant of any subsequent rate adjustment.

Replacing the current cable reporting and payment system based on gross receipts and DSE values with a monthly per signal subscriber rates offers several advantages. It would level the playing field by offering a uniform signal rate for retransmitters in similar circumstances. A monthly cents per subscriber payment plan is followed by many cable networks. Consequently, this approach appears to be favored in private, free market transactions. Basing the payment on number of subscribers requires easier and less intrusive reporting than does the present cable plan. It would also obviate many current disputes about reporting and payment that relate to gross receipts calculations.

Threshold Questions For Setting Royalty Rates

MPAA does not propose to present a numerical monthly rate per subscriber in these comments, but only to address the overall framework for the rate determination. Several threshold questions must be addressed to identify the proper framework for setting reasonable royalty rates.

- Should royalty distribution be made to owners of network programming or not?
- Should royalty payments be made for retransmission of local signals?
- Should a 3.75-like rate be continued?

MPAA believes that all these questions should be answered affirmatively. Current market conditions suggest that royalty payments should be made for network and local signals. Basic cable networks receive a dual revenue stream of license fees from retransmitters along with advertising revenues. The dual stream reflects that two different customers (retransmitters and advertisers) receive separate, but interrelated, benefits from the use of the programming on cable networks. The program prices paid by cable networks reflect the dual revenue stream.

For broadcast signal retransmissions of network and local programs, the prices paid for programming reflect the advertisers' use of the programming. But, absent a royalty payment, there is no monetary recognition that retransmitters use programming for their commercial gain. Copyright owners are unable to capture any portion of these subscriber revenues because of the compulsory license. Payment of royalty fees by retransmitters for their use of programming would redress this imbalance by allowing owners to capture some portion of the subscriber revenues that retransmitters receive.

A significant danger of using a low monthly subscriber rate for all retransmitted signal is that it will encourage heavy usage of retransmitted broadcast signals. This would adversely affect

copyright owners by further diminishing the opportunity for them to syndicate exclusive rights in the syndication marketplace. The 3.75 royalty liability has served a useful function of making cable operators carefully consider whether to take additional distant signals. If a compulsory license is to exist, continuation of such a mechanism, in the form of a rate step set at a 3.75-like level, would serve the same useful function.

Royalties Should Be Paid For Local Signal Retransmission

Retransmission of local signals is a valuable part of the programming packages offered to subscribers. In a free market, copyright owners would obtain some portion of those subscriber revenues. Copyright owners should be allowed to capture a small portion of these same revenues through royalty fees. MPAA proposes that a royalty rate be charged for retransmission of each local signal.

Signal Status Should Be Simplified

Perhaps no area requires as much effort under the current cable plan as determining the proper signal status (i.e., distant/local and permitted/non-permitted) to be assigned to retransmitted stations. To eliminate the difficulty associated with distant/local determinations, MPAA proposes that commercial stations be considered local only in their designated market areas (DMAs) and distant in any areas outside their DMAs.²

² The definition of local area for noncommercial stations would be remain the same as it is today.

An area of considerable complexity in the present system relates to the permitted/non-permitted question for determining what signals are subject to the 3.75 royalty rate. This area requires knowledge of long-deleted FCC rules, of individual FCC waiver decisions, and of defunct cable system carriage. As a replacement, MPAA proposes that all retransmitters be charged one rate for retransmission of a specified number of distant signals (in effect, these would be equivalent to permitted signals). Any signals retransmitted in excess of this specified number would be charged at a higher, 3.75-like cents per subscriber rate. Such an approach would make rate determinations easier, and would put all retransmitters in the same position.

Assuring Security of Signal Exclusivity

An important feature of the syndication business is the ability to offer exclusivity to stations on their local markets. Loss of that exclusivity due to a retransmitter's inability to protect against unauthorized receipt of a local signal ("program leakage") will seriously harm syndicators. Retransmission of local signals via wired facilities by cable systems offers a relatively high degree of protection against program leakage outside the local service area of a station. Attaining a similar level of protection and security for retransmission systems that cover larger, regional areas (wireless OVS) or national areas (satellite carriers) is a matter of considerable concern to MPAA.

The extent to which regional or national retransmitters are unable to offer security against program leakage will adversely

affect the syndication market by impinging on the ability to offer exclusivity. At the same time, MPAA recognizes that to create a level playing field for all retransmitters, regional and national retransmitters should be subject to exclusivity rules that are reasonably comparable to those applicable to cable systems. These competing interests must be balanced in some manner that protects the legitimate interests of all concerned.

MPAA favors a solution to potential program leakage problems that creates a strong incentive for retransmitters to assure that program leakage beyond the DMA will not occur. It appears that where significant incentives exist, for example, in the case of pay-per-view, adequate security can be devised to prevent retransmission of programming to unauthorized users.

Since copyright owners are unable to withhold programming from retransmitters that do not provide sufficient security and protection against program leakage, an alternative option would be to create a meaningful penalty for any leakage that occurs. Creating such a penalty requires that a retransmitter that allows program leakage be identified as an "infringer," within the meaning of Section 501 of the Act, and subject to the Chapter 5 remedies available against infringers. This places the burden on the retransmitter to undertake sufficient security measures to prevent such leakage.

Copyright Revision Cannot Be Divorced From Communications Policy

The interrelationship between copyright and communications policies was established before the current compulsory licenses

were established, and is integral to operation of the current licenses. The Office should not lose sight of that interrelationship in recommending revision to the compulsory licensing plan.

The goal of comparable treatment for all retransmitters under the compulsory license cannot be achieved without also requiring comparable treatment under applicable communications rules. The objective should be to create a level playing field, recognizing the technological differences among retransmitters. All retransmitters must be subject to reasonably comparable rules (for example, must carry, syndicated and sports exclusivity, network nonduplication) before they can be eligible for the same compulsory license rates and conditions. It might also be useful to reexamine the FCC's cross-ownership rules as they apply to retransmitters.

The underlying balance between application of the FCC rules and the royalty rates found in Section 801(c)(2)(C) of the Act must be maintained across all retransmitters that are eligible for a compulsory license. A situation in which the royalty rates are the same for all, but some retransmitters are bound by FCC rules, while others are not, would create an unfair advantage. Creation of a level playing field for all requires that both sides of the copyright/communications equation be kept in mind.

MPAA's detailed responses to the questions raised in the *Notice* follow.

- 1) Are compulsory licenses still justified? Perpetually? Or, can they be phased out?

Given the abundance of program material available in the free marketplace, compulsory licenses are no longer justified. Although the current conditions justify an immediate end to the compulsory license, NPAA recognizes that such action might cause economic dislocation. To minimize such dislocation, NPAA suggests that one possibility to consider is that the licenses be phased out on a station-by-station basis as each station transforms its operation from analog to digital broadcasting.

- 2) If compulsory licenses are justified, are the present configuration and present provisions fair and equitable? Or, should adjustments be made? If so, what should the changes be?

The present configuration and provisions are not fair and equitable. Cable royalty rates are not based on market value considerations, and thus provide owners with a less than fair return for their programming. In general terms, the adjustments that should be made would be the merger of the current plans into a single compulsory license under which eligible retransmitters would be subject to comparable rules, would pay simplified royalty fees that are based on fair market value, and would also be subject to similar rules under communications law. The end result of these adjustments should be to create a level playing field for all eligible retransmitters.

- 3) Should the existing licenses be combined into one new license?

Yes, but this can only be done if all eligible retransmitters are also subject to reasonably comparable rules under communications law. The objective should be to create a level playing field, recognizing the technological differences among retransmitters. It is important to maintain the existing symmetry between the obligations of retransmitters under communications law and the benefits they receive under the compulsory license.

- 4) Should new uses or services be combined in a compulsory license? Or, should new uses or services be subject to separate and distinct licenses?

Entirely new uses or services, such as Internet services, should be required to negotiate for retransmission rights in the marketplace and should not be eligible to receive the benefits of a compulsory license.

- 5) Do the conditions that warranted creation of those licenses continue, or have circumstances changed such that the need and/or configuration of those licenses should be altered?

Circumstances have changed and require that the present licenses be altered. There is an abundance of non-broadcast material available in the free marketplace. The marketplace has already shown, in the case of cable networks, that program licensing can be done efficiently and at low-cost, thus negating a principal reason for the compulsory license. Further, the market has offered solutions for matters falling within the compulsory license. Private parties solved the possible blackouts that could have occurred for superstations after reinstatement of the FCC syndex rules. The professional sports leagues have also been able, through their member clubs, to receive payments over and above the royalty fees for the distant carriage of games by superstations or to restrict the number and scheduling of games carried by superstations. These situations indicate the market can adjust retransmission rights for broadcast programming as needed without relying on a compulsory license.

- 6) Is there a continuing need for the cable and satellite licenses, or should cable and/or satellite carriers be required to negotiate the licensing of broadcast programming in the free marketplace?

Cable and satellite carriers should be required to negotiate the licensing of broadcast programming in the free marketplace. As noted in answer 1) above, NPAA would agree to a phase-out of the compulsory license despite our belief that the compulsory license is no longer needed.

- 7) In the alternative, should the compulsory licensing scheme of the Copyright Act be expanded?

No.

- 8) Should new types of broadcast retransmission services, such as open video systems provided by telephone companies and retransmission services via the Internet, have their own separate compulsory licenses?

No, there should be a presumption that compulsory licenses are not necessary.

- 9) Or, is it better to place these services in the existing compulsory license structure? How could this be achieved?

These services should not be placed in the existing compulsory license structure. Compulsory licenses are no longer necessary and in any case the existing structure is inadequate to deal with the issues related to new types of retransmission services. NPAA set forth in its comments on the open video system rulemaking some concerns about the inadequacies of the present plan in dealing with the still-undefined open video system service. There is no justification for allowing retransmission via internet to be placed under a compulsory license.

- 10) Furthermore, assuming that a compulsory licensing scheme should remain for broadcast retransmissions, should the cable and satellite licenses be unified into a single compulsory license applicable to all retransmission providers?

Combining the cable and satellite licenses seems to make sense, but only if cable and satellite retransmitters are subject to comparable rules under communications law. For the reasons noted, NPA does not favor expanding a unified compulsory license to other retransmitters.

- 11) What are the practical barriers to such a single license? What are the advantages or disadvantages?

For a single license covering cable and satellite carriers, the practical barrier and chief advantage involves creating a level playing field that is fair to both services. Creating such a level playing field would require consideration of the interplay of communications law policies with the compulsory license. Additional advantages of a combined license include administrative efficiency and reduced distribution costs. The chief disadvantage is that a unified license would create the false impression that other retransmission services could automatically be placed within the license.

- 12) If the cable and satellite carrier compulsory licenses remain separate, should the royalty rates paid under both licenses be equalized? Should this be done in the statute, or should the criteria for adjusting royalty rates be made the same for both licenses?

Yes, royalty rates should be equalized, but only if both types of retransmitters are subject to reasonably comparable rules under communications law. Setting equalized royalty rates should be done by statute. The criterion for setting and adjusting the equalized royalty rates should be fair market value.

- 13) Should the standard be the fair market value of the copyrighted works, or are there other or additional criteria that should be used?

The only standard should be fair market value.

- 14) Recognizing that the current appeal may not be the final word on must-carry (the Supreme Court could, for instance, find the concept of must carry to be constitutional but then find fault with the current must-carry rules), what impact might the Court's decision have on the current compulsory licensing scheme?

Not applicable.

- 15) If the Court upholds must-carry, should must-carry be extended to the satellite carrier compulsory license and the provision of local network signals, as well as all other broadcast retransmission services seeking compulsory licensing?

Given the technological differences between cable and satellite carriers, must carry distinctions may be appropriate. But notwithstanding such differences, all retransmitters should be subject to comparable must carry rules.

- 16) If the Court strikes down must-carry in whole or in part, as unconstitutional how should that affect a revised compulsory license scheme for broadcast retransmissions?

Not applicable.

- 17) Should the cable compulsory license be reformed to reflect the current marketplace and regulatory framework?

Yes. This could be accomplished by establishing a monthly per subscriber fee structure that is determined under a fair market value criterion.

- 18) Should the royalty payment scheme of the license, based upon each cable system's gross receipts for the retransmission of broadcast signals, be simplified so as to remove reliance upon outdated FCC rules?

Yes.

- 19) Is the per subscriber, per signal charge of the satellite carrier license an appropriate solution? If not, why not? Are there other solutions?

The per subscriber, per signal charge seems to be the most appropriate solution in the current circumstances, given that most, if not all, cable networks follow the same approach.

- 20) Should the payout of royalties collected under the cable license be broadened to include compensation for network programming as well as nonnetwork programming?

Yes, owners of network programming should receive payment, but this change must be accompanied by a requirement that retransmitters pay for network programming.

- 21) Should the cable compulsory license be amended to reflect the significant amount of mergers and acquisitions in the cable industry? If so, in what ways?

Yes. As explained in comments filed in the rulemaking related to this issue, combining subscribers and subscriber revenues of merged/acquired systems must be done for determining the proper royalty plan to follow. All this

would be mooted, however, if the royalty plan were switched to a per subscriber rate.

- 22) Does the cable license need to be amended to accommodate retransmission of over the air radio signals, and should all broadcast retransmission services be allowed to carry radio as well as television broadcast signals?

No position.

- 23) Is it appropriate to include video dialtone and open video system platforms, and other newcomers such as broadcast retransmissions via the Internet, within the cable compulsory license?

No.

- 24) If so, does the license require amendment to accommodate these operators, and in what fashion?

These services should be required to operate in the free marketplace.

- 25) Does the passive carrier exemption of 17 U.S.C. 111(a)(3) require amendment to accommodate these services?

No, in fact the exemption should be tightened to avoid expanding this common carrier provision to accommodate these services. Only true "common carriers" should be eligible for the passive carrier exemption.

- 26) How can the cable license be amended so that all users of the license are in parity with one another in terms of the signals that they are permitted to provide and the royalty amounts they pay for those signals?

This issue would be resolved by adopting a single per subscriber, per signal charge and otherwise treating cable and satellite carriers comparably for copyright and regulatory purposes.

- 27) Should there be economic and/or regulatory caps on the number of distant broadcast signals that may be carried, or should all signals be paid for at the same rates?

A 3.75-like charge should be built into any royalty structure to discourage carriage of more than a certain number of broadcast signals.

- 28) Should the existence of the cable compulsory license continue in perpetuity, or should the license be phased-out after some period of time?

The license should be phased out after a relatively short transition period.

- 29) Or, in the alternative, should the license be made periodic so that it is subject to renewal every certain number of years, such as the satellite carrier compulsory license?

MPAA favors a complete sunset after the transition period; the license should not be extended indefinitely. At most, a new license should be subject to renewal so that Congress could consider whether the license was still needed.

- 30) Is the white area restriction of the satellite license still necessary, or should satellite carriers be permitted to provide network signals to all their subscribers?

Yes, it is necessary to protect the exclusivity arrangements between networks and their affiliates and between program suppliers and program licensors.

- 31) Should the white area restriction remain in place for satellite carriers who wish to provide a subscriber with a distant network affiliate, but not apply to satellite carriers who provide retransmission of local network affiliates to their subscribers?

No position.

- 32) If so, how should a local network affiliate be defined?

No position.

- 33) Should a satellite carrier be permitted to provide retransmission of a network affiliate to subscribers who reside within the Designated Market Area of the affiliate, or is there a better way to determine local area?

No position under current law.

- 34) Is it now possible, and appropriate, to impose exclusivity protection upon satellite carriers through FCC regulation (syndicated exclusivity and network non-duplication) rather than through the copyright statute?

Yes, but there is nothing wrong with an appropriate statutory solution.

- 35) If the white area restriction remains, is the grade B signal intensity still an appropriate measure?

No position.

- 36) Should another standard be adopted, such as picture quality?

A picture quality standard is too arbitrary and too difficult to enforce.

- 37) If picture quality is appropriate, how can that be enforced as a legal standard for determining copyright infringement?

A picture quality standard would be impossible to enforce.

- 38) How can subscribers who cannot have a conventional rooftop antenna receive network signals from their satellite carrier?

Copyright law should not be governed by local laws as to whether a subscriber can have a conventional antenna.

- 39) Likewise, can persons who reside and travel in mobile homes receive network service?

No position.

- 40) What is the justification for the 90 day waiting period from any subscription to a cable system that provides the signal of a primary network station affiliated with that network, and should that provision be eliminated from the statute?

No position.

- 41) Is a possible solution to the white area question a royalty surcharge to be paid for subscribers who receive a distant network retransmission from a satellite carrier? If such a surcharge is enacted, should the fees be distributed solely to the local network affiliates or to owners of programming on those affiliates? How should the surcharge monies be collected and who should administer their payment?

A surcharge does not provide a possible solution because it would suggest that carriage to non-white areas is permissible, subject to the surcharge payment. If carriage in non-white areas is prohibited, then the compulsory license should be structured to prevent such carriage.

- 42) With respect to satellite subscribers who have their service of network signals disconnected due to the white area restriction, what means of redress can they be afforded to determine that termination of their service was accurate and required?

If a carrier or distributor had promised subscribers that they could receive networks despite the white area restriction, any redress should be against that carrier or distributor.

- 43) Can the subscriber require that either the satellite carrier terminating service, or the network affiliate challenging service, conduct a test at his/her household to determine if he/she is eligible for network service?

No.

- 44) Who should pay for such test and how should it be administered.
- Not applicable.**
- 45) What should be the appropriate standards of the test?
- Not applicable.**
- 46) If a test is created, should subscribers who currently receive network signals be grandfathered in their receipt of their signals?
- No.**
- 47) Should the matter of a subscriber's eligibility to receive network service from a satellite carrier be a matter of private determination between broadcasters and satellite carriers, or should a government agency make a determination?
- Placing the burden on a government agency would saddle the agency with considerable extra costs.**
- 48) If such restriction continues, how can it be more economically and efficiently enforced?
- No position.**
- 49) Are there better ways to identify which subscribers may receive network signals under the satellite license, and those who are not eligible?
- Zip codes.**
- 50) Should the remedies for copyright infringement be amended to provide for additional and/or different remedies for violations of the white area restriction?
- Yes, they should be strengthened to prevent violations.**
- 51) Should the disparity between the royalty fees for network and independent signals be eliminated, so that all signals are paid for at the same rate?
- Yes, if network programming is to be compensated.**
- 52) Should there be special provision for retransmission or transmission of a national satellite feed of the Public Broadcasting Service, and a separate royalty rate for this signal? What should the rate or rates be?
- NPAA would not oppose such a provision if drafted narrowly.**

- 53) Should the Section 119 license be extended on a permanent basis, or is temporary extension still an appropriate solution?

No, it should not be extended on a permanent basis.

- 54) If the extension is temporary, what mechanisms can be put into place to encourage a smooth and efficient transition into a free marketplace system?

Set the rate adjustment criterion as free market value.

- 55) Is collective administration of copyrighted broadcast programming an appropriate solution, and if so, who should administer such a system?

No, the marketplace for non-broadcast programming has demonstrated that collective administration is not necessary.

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In the Matter of)

Revision of the Cable and Satellite)
Carrier Compulsory Licenses)

Notice of Public Meetings and)
Request for Comments)

Docket No. 97-1

Comment Letter	
RM	97-1
No.	<u>36</u>

STATEMENT OF NATIONAL PUBLIC RADIO, INC.

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April 28, 1997

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**Before the
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Washington, DC**

In the Matter of)	
)	
Revision of the Cable and Satellite)	Docket No. 97-1
Carrier Compulsory Licenses)	
)	
Notice of Public Meetings and)	
Request for Comments)	

STATEMENT OF NATIONAL PUBLIC RADIO, INC.

National Public Radio, Inc. ("NPR") hereby submits its Statement in the above-captioned proceeding regarding the revision of the cable and satellite carrier compulsory licenses.¹

INTRODUCTION

NPR is a non-profit membership organization dedicated to the development of a diverse noncommercial educational radio programming service. Although best known for producing such programs as *All Things Considered*®, *Morning Edition*®, *Talk of the Nation*®, and *Performance Today*®, NPR also represents more than 560 full-service public radio stations -- themselves significant producers of local, regional, and national news, informational, and cultural programming. In addition, NPR manages the Public Radio Satellite Interconnection System -- a nationwide satellite-based program distribution network used by public radio producers to distribute programming for broadcast by local public radio stations. NPR programming also is distributed worldwide

¹ Revision of the Cable and Satellite Carrier Compulsory Licenses: Notice of Public Meetings and Request for Comments, Docket No. 97-1, 62 Fed. Reg. 13,396 (Mar. 20, 1997) ("Public Notice").

via the Armed Forces Radio and Television Network and the America One service on the Astra satellite. Finally, NPR has established a significant presence on the Internet and continues to seek additional opportunities to distribute its programming services through new media.

The compulsory licensing schemes set forth in the Copyright Act affect both the distribution and production of NPR and NPR member station programming. The signals of many NPR member stations are retransmitted by local cable television systems pursuant to the cable compulsory license set forth in Section 111 of the Copyright Act.² Moreover, NPR incorporates musical works into its programming pursuant to voluntary licenses and the compulsory license established for public broadcasters under Section 118 of the Copyright Act.³ Finally, other broadcast retransmission services would undoubtedly take advantage of a compulsory license to retransmit the signals of NPR member stations if it were available. Thus, the Copyright Office's "global review of copyright licensing for the retransmission of broadcast signals"⁴ -- which will focus on such fundamental questions as whether the cable and satellite compulsory licenses are still justified and whether these compulsory licenses should be merged or expanded⁵ -- could significantly impact NPR and its member stations.

² 17 U.S.C. § 111.

³ 17 U.S.C. § 118.

⁴ Public Notice, 62 Fed. Reg. at 13,398.

⁵ See *id.* The proceeding is likely to focus on other crucial issues as well, since the Copyright Office "welcome[d] discussion of any matters related to copyright licensing of broadcast retransmissions that interested parties deem important." *Id.* See *infra* Section IV.

As the Copyright Office embarks upon this broad-based review of the compulsory licensing of broadcast transmissions, it should seek to ensure that any new rules which emerge from this proceeding serve the public interest by encouraging the growth and development of public radio. Indeed, the Congressional findings and declaration of support for public broadcasting apply equally forcefully here.⁶ Consistent with this Congressional intent, compulsory licenses should facilitate the distribution of public radio's educational noncommercial programming to the widest possible audience, while also protecting the local nature of public radio and the valuable rights of NPR, its member stations, and other copyright holders in their works.

To achieve these goals, the Copyright Office should recommend the retention of the existing cable compulsory license, which continues to encourage the local availability of local public radio programming. However, it should not pursue the consolidation of the satellite and cable compulsory licenses because of fundamental differences between the two distribution media and the likely harm to public radio. The Copyright Office should recommend the creation of new compulsory licenses on a case-by-case basis and only when (1) there is clear evidence of a marketplace failure depriving the public of access to certain copyrighted works, (2) the compulsory retransmission of broadcast transmissions will promote rather than hinder the principle of localism that underlies the

⁶ See Public Broadcasting Act of 1967, as amended, 47 U.S.C. § 396(a)(1) ("The Congress hereby finds and declares that ... it is in the public interest to encourage the growth and development of public radio and television broadcasting"); see also *id.* § 396(a)(7) ("it is necessary and appropriate for the Federal Government to complement, assist, and support a national policy that will most effectively make public telecommunications services available to all citizens of the United States"); *id.* § 396(a)(8) ("[public] radio stations and public telecommunications services constitute valuable local community resources for utilizing electronic media to address national concerns and solve local problems").

current system of over-the-air broadcasting, and (3) particularly in the case of public radio, the cost of successfully pursuing a royalty claim is not unduly burdensome in light of the value of the claim fund.

Finally, and perhaps most importantly, the Copyright Office should use the opportunity of this proceeding to seek an extension of the Section 118 public broadcasting compulsory license to additional works and to the use of such works in distribution media that have emerged since Congress adopted the Copyright Act in 1976. Historically, public broadcasters have played an essential role in American society by producing and distributing noncommercial news, public affairs, educational, informational, and cultural programming, and by serving and providing a voice for a diversity of viewpoints. The Section 118 compulsory license has played a critical role in the mission of public broadcasting, by enabling public broadcasters to avoid the administrative and financial burdens of individual licensing, while ensuring fair compensation to the underlying copyright holders. By seeking an extension of Section 118 to additional works and an updating of the license to cover new media, the Copyright Office can ensure the future success of the public broadcasting mission.

I. The Present Cable Compulsory License Scheme Serves The Public Interest And Should Be Retained

At the outset of the Public Notice, the Copyright Office asks whether the cable compulsory license is still necessary and, if so, whether any changes should be made to the present compulsory licensing scheme.⁷ As shown below, the cable compulsory

⁷ See Public Notice, 62 Fed. Reg. at 13,398, 13,399.

license remains essential to the continued availability of public radio programming to the American public. Any changes to the present scheme should neither limit this availability nor impose additional burdens on NPR or its member stations.

Section 111 of the Copyright Act permits a cable operator to retransmit a primary broadcast transmission embodying a performance or display of a work, provided that the cable operator deposits the appropriate statement of account and royalty payments with the Register of Copyrights on a semi-annual basis. The license applies to primary broadcast transmissions by both television and radio stations.⁸ Congress imposed this system after recognizing "that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system."⁹

The reasons supporting the establishment of the cable compulsory license in 1976 resonate just as loudly today. The process of negotiating an individual license with each broadcaster retransmitted by the cable system *and* each separate holder of a copyright in a work carried by the broadcaster, including networks, syndicators, and independent producers, remains entirely impractical and unduly burdensome. Quite simply, NPR and its individual member stations lack the resources to negotiate with each cable system that would like to retransmit the programming of NPR and its member stations. Thus, if Congress were to eliminate the cable compulsory license, the administrative and financial burdens of individual licensing would likely cause many cable systems to cease carrying

⁸ 17 U.S.C. § 111(a), (d).

⁹ H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89 (1976).

public radio stations altogether.

Although it is not the primary source of public radio program distribution, local cable system carriage of local public radio stations clearly serves the public interest. Specifically, cable carriage is an important source of distribution of public radio programming to (a) audiences within the local service area of a public radio station who, because of difficult terrain or other conditions, cannot receive the local public radio station's signal or receive a better quality signal from cable than over-the-air broadcasting, and (b) audiences in primarily rural areas which receive service from a nearby public radio station via cable, but which are outside of the station's local service area. Without the compulsory license, many of these audiences would be deprived of access to the valuable and unique noncommercial educational and informational radio programming offered by NPR and its member stations.

The retransmission of public radio stations on cable systems also provides a modest stream of income to NPR and its member stations, which helps to maintain the high quality educational and informational programming that the public has come to rely upon. In the most recent cable royalty distribution proceeding, NPR and the participating NPR member stations received a distribution of .18 percent of the total fund of compulsory license fees, which amounted to a share in the \$200,000-\$300,000 range for each year covered by the proceeding.¹⁰ If the cable compulsory license were eliminated, this income would likely disappear as a result of the increased cost of negotiating

¹⁰ See Distribution of 1990, 1991 and 1992 Cable Royalties, 61 Fed. Reg. 55,653, 55,661 n.7 (Oct. 28, 1996). The total claim fund amounted to more than \$500 million. *Id.* at 55,655.

individual licenses and discontinued cable carriage of public radio stations. At a time of diminishing Federal funding of public broadcasting, this income is more important than ever to the continued development, production, and distribution of high-quality educational and informational radio programming.

The Copyright Office also has asked whether any specific changes should be made to the terms of the cable compulsory license.¹¹ As stated above, NPR believes that the current license serves the public interest. Thus, NPR urges the Copyright Office not to recommend or make any changes that would limit the availability of public radio programming or impose new burdens on the limited resources of NPR or its member stations.

II. The Satellite Compulsory License Should Not Be Consolidated With The Cable Compulsory License

Among the principal issues before the Copyright Office in this proceeding are the continuing need for the existing direct-to-home satellite compulsory license and whether "the cable and satellite licenses [should] be unified into a single compulsory license."¹² While NPR has no direct interest in the existing satellite compulsory license, which only applies to the retransmission of television broadcast signals, NPR believes it is clearly in the public interest to establish special measures to facilitate the distribution of the national PBS programming service.¹³ As discussed above, moreover, NPR has a direct

¹¹ See Public Notice, 62 Fed. Reg. at 13,399.

¹² *Id.* at 13,398.

¹³ See *id.* at 13,400. For example, NPR supports PBS's proposed legislation to expand the satellite compulsory license in order to permit nationwide retransmission of the PBS National Satellite Service to all DBS subscribers.

interest in the Section 111 license, and it opposes the consolidation of the satellite and cable compulsory licenses.

Consolidation of the cable and satellite compulsory licenses is unwarranted because the two retransmission services are technologically and functionally very different. Cable is a predominantly local service: Although there are large cable multiple system operators and program producers, each cable system is franchised to a discrete geographic area, local franchise authorities have considerable authority to condition a franchise grant on the operator's offering of locally-responsive services, and, even as a technical matter, each cable headend serves a relatively small area. Moreover, while cable systems retransmit "distant" radio stations, such retransmissions generally have not supplanted the cable carriage of local stations.

The existing direct-to-home satellites, on the other hand, have large geographic "footprints" and channel capacities that are extremely limited in relation to the potential number of program services. As a result, the direct-to-home services are, by necessity if not by design, national in scope.¹⁴

The cable and satellite compulsory licenses also have very different origins and goals. In the case of the cable compulsory licenses, Congress enacted the Section 111 scheme only after years of consideration and in light of (1) a complex regulatory scheme

¹⁴ Although some have proposed the use of "spot beams" to deliver local television stations by satellite to areas roughly equivalent to the local television station's service area, this technology is as yet unproven and is unlikely to be sufficiently local for radio stations. See, e.g., News Corp. Buys Into EchoStar, *Communications Daily*, Vol. 17, No. 38, at 2 (Feb. 26, 1997). Moreover, even if developed, it is unlikely that the spot beam technology would be used by more than a few satellite operators. As a result, it is unclear whether the benefits associated with industry-wide, rather than individual, licensing outweigh the administrative and financial costs associated with arbitrated royalty distribution proceedings.

that inextricably linked the cable and broadcast industries, (2) the practical difficulty of requiring individual license negotiations among thousands of cable systems and broadcast stations, and (3) the need to preserve the nationwide system of local over-the-air broadcasting.¹⁵ The satellite compulsory license, on the other hand, was enacted as a transitional measure to assure the availability of packages of programming comparable to cable fare -- essentially, an affiliate of each of the principal broadcast television networks, the superstations, and the most popular cable program services -- to home satellite dish owners until a market developed for that distribution medium.¹⁶

Based on these fundamental differences, it is unclear what, if any, benefit would be derived from creating a single comprehensive license. Indeed, as a matter of administrative efficiency, a consolidated license is likely to be even more complex to devise and administer than the current service-specific licenses. Moreover, because radio broadcast retransmissions are covered by the cable compulsory license, but not the satellite compulsory license, consolidation is likely only to create further confusion and complexity -- for public radio producers and cable and satellite operators alike. Finally,

¹⁵ See H.R. Rep. No. 1476, 94th Cong. 2d Sess. 88-91 (1976). The Copyright Office is obviously familiar with the circumstances surrounding the enactment of Section 111:

The Office notes that at the time Congress created the cable compulsory license, the FCC regulated the cable industry as a highly localized medium of limited availability, suggesting that Congress, cognizant of the FCC's regulations and market realities, fashioned a compulsory license with a local rather than a national scope. This being so, the Office retains the position that a provider of broadcast signals be an inherently localized transmission media of limited availability to qualify as a cable system.

Cable Compulsory Licenses: Definition of Cable Systems, 62 Fed. Reg. 18,705, 18,707 (Apr. 17, 1997).

¹⁶ See H.R. Rep. 887, Part I., 100th Cong., 2d Sess. 8-14 (1988).

even if the consolidated license were applied uniformly to radio broadcast retransmissions, the administrative and financial cost to public radio producers and stations of establishing the market value of their programming under the new license could be prohibitively high in relation to the amount of the likely royalty awards.

III. The Copyright Office Should Carefully Consider Whether New Compulsory Licenses Are Warranted To Facilitate The Simultaneous Retransmission Of Radio Broadcast Signals By New Media

Congress has established compulsory licenses as an exception to the general rule of individually negotiated licenses, and only when specific economic, technological, and other compelling factors would otherwise deprive the public of access to particular copyrighted works. Accordingly, before recommending the creation of any new compulsory licenses, the Copyright Office should first determine that there is a marketplace failure that is preventing the individual licensing of broadcast programming and, as a result, the availability of that programming to the public. As a corollary, where a new distribution technology is substantially similar to and competitive with the existing cable or direct-to-home satellite technologies, a comparable compulsory license or inclusion within the existing compulsory license may be warranted. With special regard to public radio programming, the Copyright Office should also determine whether a potential new compulsory license will facilitate rather than hinder local retransmissions of local public radio broadcast programs.

A. Because Of Its Similarity To Traditional Cable Service, It May Be Appropriate To Extend Compulsory Licensing To Open Video Systems

Based on their apparent similarity to cable, Open Video Systems ("OVS") would appear to warrant inclusion under the Section 111 compulsory license. The distribution technology is functionally indistinguishable from traditional cable technology, and both OVS and cable are essentially local subscription services featuring, as a significant component of their services, local retransmission of local broadcast programming. Moreover, as a nascent competitor to cable, disparate copyright treatment could substantially skew the competitive landscape. And, while failing to include OVS under Section 111 or a comparable compulsory license is unlikely to deprive the public of access to broadcast signals, the disparate copyright treatment could force consumers to pay higher rates for cable service than they otherwise would.

B. There Are Significant Risks Associated With Extending Section 119 To Radio Broadcast Signals Or Creating A Compulsory License For Audio-Only Services

NPR is concerned that either extension of the Section 119 license to radio broadcast signals or the creation of a new compulsory license for audio-only satellite services, such as DARS, would harm rather than enhance the public interest.¹⁷ As an initial matter, there is no evidence to suggest that compulsory licensing of public radio broadcast signals for direct-to-home satellite distribution is necessary to overcome a marketplace failure or to assure public access to public radio programming. In the case of

¹⁷ See Public Notice, 62 Fed. Reg. at 13,399.

DARS, in particular, the services have only now been licensed.¹⁸ It is therefore premature to conclude that the preferred approach of individual licensing will not succeed.

Even more significantly, the harm to public radio is potentially substantial. First, if Section 119 were extended to radio broadcast signals, the historic disparity between the market value of television and radio signals for purposes of in-home reception could result in an undervaluing of the radio broadcast programming. Second, and assuming an accurate assessment of the value of television and radio broadcast signals or a DARS-specific compulsory license, the costs associated with demonstrating the market value of programming and litigating a royalty claim could be significant, particularly when compared to the likely fund amounts associated with in-home listening.¹⁹

Finally, there is a risk that the compulsory licensing of public radio signals for satellite retransmission could undermine the principle of localism. Given the large coverage areas and relatively limited channel capacities of the existing and proposed satellite services, the compulsory license could benefit only a few public radio stations. Moreover, because satellite subscribers nationwide could tune to the distant satellite-delivered signal instead of their local NPR member station, a large number of stations could face an erosion of their local membership base.

¹⁸ See FCC DARS Auction: Satellite CD Radio, Inc. and American Mobile Radio Corp. High Bidders for Two Nationwide Licenses, FCC News Release (Apr. 2, 1997); Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, IB Docket No. 95-91, GEN Docket No. 90-357, FCC 97-70 (rel. Mar. 3, 1997).

¹⁹ Of course, if direct satellite-to-motor vehicle audio services emerge and are subjected to compulsory licensing, the total value of the royalty fund would be significantly greater.

The potential threat to localism could be averted if Congress adopted a "white area" approach for radio stations, such that satellite operators could only retransmit the programming of an NPR member station to areas which are not served by any other NPR member stations.²⁰ In practice, however, enforcing a "white area" restriction is difficult and expensive, and NPR's member stations generally lack the resources to ensure consistent enforcement. Even under this approach, moreover, only a few NPR member stations would likely benefit instead of public radio stations across the country.

C. It Is Premature To Recommend The Establishment Of A Compulsory License For Simultaneous Retransmissions Of Broadcast Signals Over The Internet

The Copyright Office's inquiry regarding expansion of the existing compulsory licenses to the simultaneous retransmission of broadcast programming over the Internet appears untimely. Still very much in its infancy as a medium of mass communication, the Internet constitutes a unique combination of computer and communications capabilities profoundly different than any other distribution medium. Indeed, because its transmission capabilities are so decentralized, the Internet offers any interconnected computer user the ability to transmit video and audio content instantaneously around the world with one click of a key stroke.

Whether the Internet becomes the predominant technological means for distributing content in the future, there is no evidence to suggest that the extension of the compulsory license to the simultaneous retransmission of broadcast signals is now, or will be in the foreseeable future, necessary to ensure the public availability of broadcast

²⁰ Cf. 17 U.S.C. § 119(a)(2)(B).

programming. Even if simultaneous Internet retransmissions of broadcast programming could be confined to the United States, only a small fraction of the public currently lacks access to such programming either as broadcast over-the-air or retransmitted via cable or direct-to-home satellite.²¹

Because Internet transmissions are not subject to any inherent geographic limitations, exposure to national and international audiences through simultaneous Internet retransmissions of local broadcast stations is likely to undermine rather than enhance the production and broadcast distribution of locally-oriented programming. There would also be significant practical difficulties associated with the compulsory licensing of simultaneous Internet retransmissions of broadcast signals. As the Copyright Office is well aware, attempting to limit the availability of the license to a defined group of recipients in the face of technological change is a difficult task.²² To avoid that challenge, the license could be made generally available to anyone with access to the Internet. As noted above, however, the process for administering royalty claims is difficult, time consuming, and expensive, even though the universe of potential claimants under the existing licenses is relative static.²³ Therefore, absent a demonstrable need, and unless it can devise an enforceable and efficient compulsory licensing scheme for

²¹ See Corporation for Public Broadcasting, Frequently Asked Questions About Public Broadcasting 1995, at 5 (explaining that 91% of Americans receive at least one public radio signal); 1997 Broadcasting & Cable Yearbook at xxi (explaining, for example, that 98% of all homes in the United States have television sets, 99% of all homes in the United States have radios, and 67% of all homes in the United States are reached by cable systems).

²² See Satellite Broadcasting and Communications Ass'n of America v. Oman, 17 F.3d 344, 348 (11th Cir.), cert. denied, 115 S. Ct. 88 (1994).

²³ See, e.g., Distribution of 1990, 1991 and 1992 Cable Royalties, 61 Fed. Reg. at 55,653.

simultaneous Internet retransmissions of broadcast signals, the Copyright Office should defer recommending the creation of such a license at this time.

IV. The Copyright Office Should Recommend The Expansion Of Section 118 So That The Compulsory License For Public Broadcasters Extends To Additional Categories Of Works And To Additional Uses Of The Covered Works

As discussed above, the existing copyright law reflects the Congressional recognition that, under certain circumstances, compulsory licensing is either necessary or salutary. While the Copyright Office has focused this proceeding on the retransmission of broadcast signals -- by existing and new media and under existing and possibly new or modified compulsory licensing -- it ought to take this opportunity to examine the extension of the public broadcasting compulsory license set forth in Section 118.

Congress established Section 118 in recognition of the important role that public broadcasters play, the unique aspects of their use of copyrighted works, and the limited financial and administrative resources available to negotiate individual licenses with copyright owners. As explained in the legislative history to the Copyright Act:

[The House Judiciary Committee] is also aware that public broadcasting may encounter problems not confronted by commercial broadcasting enterprises, due to such factors as the special nature of programming, repeated use of programs, and, of course, limited financial resources. Thus, the Committee determined that the nature of public broadcasting does warrant special treatment in certain areas.²⁴

Section 118 addressed public broadcasters' need for access to "copyrighted materials at reasonable royalties and without administratively cumbersome and costly 'clearance,'

²⁴ H.R. Rep. No. 1476, 94th Cong., 2d Sess. 117 (1976).

problems that would impair the vitality of their operations."²⁵ Moreover, Section 118 balances the interests of copyright owners and public broadcasters, by encouraging the negotiation of individual licenses but granting a compulsory license when the market mechanism fails.²⁶

The considerations that justified the enactment of Section 118 in 1976 warrant extension of the compulsory license -- both to additional categories of works and to distribution media that have emerged since then. Currently, the Section 118 compulsory license applies only to published musical works and published pictorial, graphic and sculptural works used in a performance or display in the course of a transmission and in production of a transmission program.²⁷ Extending the compulsory license to dramatic musical works, as well as non-musical works such as literary works (books, poems, short stories), films, and non-musical recordings, would facilitate the creation of noncommercial educational and informational broadcast programming by eliminating the administrative and financial burdens associated with clearing rights on an individual license basis. In fact, extending the compulsory license now is especially timely because of the reduced Federal funding for public broadcasting.

Extending Section 118 to permit public broadcasters to distribute their works over additional media would also serve the same interests that Congress intended to promote when it adopted Section 118. Public broadcasters are aggressively pursuing their

²⁵ Id.

²⁶ See 17 U.S.C. § 118(b).

²⁷ Id.

mandate to make the broadest possible distribution of noncommercial educational and informational programming over new media, including CD-ROM, on-line and Internet services, and satellite and broadband technologies.²⁸ However, it is difficult, if not impossible, to compete with commercial program producers and distributors given the administrative and financial cost of individual rights clearances and the limited administrative and financial resources of public broadcasters. Indeed, if there is to be a significant use of new media to distribute public interest programming, it is likely to occur only with the establishment of a licensing mechanism that avoids the burdens of individual rights clearances while fairly compensating the rights holders.

CONCLUSION

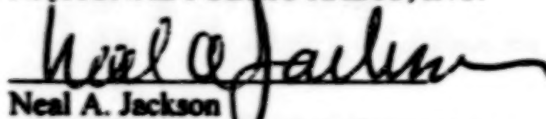
For the foregoing reasons, NPR urges the retention of the cable compulsory license as it currently exists and distinct from the direct-to-home satellite compulsory license. NPR further urges the Copyright Office to recommend the establishment of new compulsory licenses for the simultaneous retransmission of broadcast signals only when warranted by compelling technical, economic, and other factors. That appears to be the case with OVS, but not with direct-to-home satellite services and, especially, not with the

²⁸ While it would be premature to expand the cable or satellite compulsory licenses to permit the simultaneous retransmission of broadcast signals over the Internet, *see supra* Section III.C., it is timely to expand the public broadcasting compulsory license to encourage the creation of *new* public telecommunications services.

Internet. Finally, the Copyright Office should use the opportunity of this proceeding to recommend an extension of Section 118 to additional works and to the electronic media that have emerged since 1976.

Respectfully submitted,

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April 28, 1997

Comment Letter

RM 97-1*

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Written Testimony of

Prof. W. Russell Neuman,
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Before the Copyright Office of
The Library of Congress
May 1997

GENERAL COUNSEL
OF COPYRIGHT

APR 28 1997

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OPTIMIZING VIEWER CHOICE IN A TIME OF TECHNICAL TRANSITION:
DSS, CABLE AND TERRESTRIAL BROADCASTING

My name is W. Russell Neuman. I teach telecommunications technology and policy at Harvard and MIT and conduct research on human factors and audience response to new communications technologies. I'm associated with the Shorenstein Center at Harvard's Kennedy School and the MIT's Media Laboratory and Research Program on Communications Policy.

As we review the technical and policy options before us in the Spring of 1997, it is abundantly evident that we confront a period of rapid technical change and policy evolution. Just a few years ago the distinctions between computer networks, terrestrial broadcasting, satellite and cable broadcasting were relatively clear. In 1988, when the FCC started its review process for the establishment of advanced television service, it focused almost exclusively on high resolution broadcasting in a terrestrial setting. There was no attention to digital compression for multi-channel television, digital broadcasting, or interactive media such as Internet and web-based video. By 1996, the Telecommunications Act began what is likely to become a long and complex process of transition from a series of unique communications networks to a single, multifaceted digital network of networks that mixes broadcasting and narrowcasting, video and voice, graphics and text.

The need to balance the needs of an open and flexible network and vibrant, democratic, marketplace of ideas with the legitimate and appropriate intellectual property rights of artists and programmers will continue to occupy the attention of this office.

Today I will focus my remarks on a narrow slice of this complex process -- the restrictions of the Satellite Home Viewer Act of 1988 on direct-to-home satellite transmission of television network programming. The 1988 Act attempts to balance the needs of remote unserved households who would clearly benefit from and desire network programming via DBS with the concerns of local network-affiliated terrestrial broadcasters who are uncomfortable about direct competition with satellite delivered programming. Such programming clearly threatens the local affiliate's advertising revenue stream and, they argue, the public interest as declining revenues fail to support local television production of news and public affairs programming.

The irony here is that the Act appears to define the public interest in terms of the economic interests of local network affiliates. If network programming is available via terrestrial transmission, cable and DBS, the public makes its choice -- the service with the most diverse programming and highest technical quality at the best price wins. In terms of the networks themselves, the larger the audience, the more revenues from advertising. Networks do not derive meaningful income from cable operators or affiliates.

The presumption, it would appear, is that network programming is supposed to subsidize local news and public affairs programming. It is indeed a historical fact of the past 50 years of broadcasting, but it is not a part of the 1934 or 1936 Acts as a matter of public policy. The cable companies do not ask the Copyright Office and the Congress for special prohibitions from competition to support their public affairs programming such as C-SPAN.

As a result we find ourselves reviewing a complex set of technical regulations for determining 'served' and 'unserved' households as derived from signal strength measurements of local network affiliates.

My first choice in recommending an appropriate policy for the future would be to let the viewers decide for themselves. If they declare that the quality of local service is unsatisfactory in their judgment and

they wish access to satellite delivered network programming, it should be made available. If local programming of special interest (although of less than satisfactory picture quality) is available, our research indicates that households will watch it. Within reasonable bounds they value content over picture quality. Thus local programmers will not lose the capacity for local programming when local audiences wish to view it. The presumption that potential DBS subscribers can not be trusted to give a truthful assessment of acceptable picture quality is ironic. The public is unable, it would appear, to define their public interest-- better two engineers in a truck with special measurement gear.

What is most troubling to me about the 1988 law is the equation of signal strength with viewable picture quality in determining served and unserved household.

Our research indicates that there are numerous examples when Grade A or Grade B signal strength is available to a household while for various technical reasons the actual television picture is virtually unwatchable. We ran extensive technical tests in Pittsburgh in 1996 which demonstrated numerous examples of high signal strength and low picture quality. This technical report will be made available to the Copyright Office.

The 1988 law represents a compromise of various economic and public interests. The need for a technical/legal definition of served and unserved forced the framers of the legislation to dredge up some old testing techniques from the 1950s which were designed for optimal allocation of licenses to new broadcasting stations to serve the largest public possible. That goal was served in the 1950s. The technology and the demand of the public for diversity and higher quality requires a thorough reexamination of premises and technical options. The public can be better served.

Document Letter
RM 97-1
No. 38

GENERAL COUNSEL
OF COPYRIGHT,
APR 28 1997
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**WRITTEN TESTIMONY OF WILLIAM H. HASSINGER
BEFORE THE COPYRIGHT OFFICE
OF THE LIBRARY OF CONGRESS**

April 28, 1997

I was employed as an electronics engineer for nearly 23 years with the Federal Communications Commission. From January 1980 to April 1987 I was the Engineering Assistant to the Chief of the Mass Media Bureau. From April 1987 until my retirement in September 1995, I was the Assistant Bureau Chief (for Engineering) of the Mass Media Bureau. During my tenure in the Bureau, I was responsible for overseeing the development of engineering policy and rulemaking in television and radio broadcasting. My duties required me to analyze and explain to Commissioners, agency managers, Congressional staff, and members of the Broadcast industry the intent and effect of technical studies, filings, regulations, and statutes. As Assistant Bureau Chief, I was the Mass Media Bureau's expert and chief spokesman on all aspects of the Federal Communications Commission's proceeding on Advanced Television (or HDTV) and, as such, helped formulate and write the proposals and policies in all Advanced Television rulemakings.

I hold the degrees of Bachelor of Science with a major in Economics from the University of Wisconsin, Madison, Wisconsin, and Master of Science in Electrical Engineering from the U.S. Naval Postgraduate School, Monterey, California.

I have been assisting PrimeTime 24 as an expert witness in its defense of several lawsuits in which national television networks or their affiliates have alleged that PrimeTime 24 has violated the terms of its statutory license under the Satellite Home Viewer Act of 1988, as amended ("SHVA" or the "Act"). PrimeTime 24 has asked me to participate in these hearings in order to highlight the misapplication of technical concepts in the SHVA compulsory licensing scheme. These serious deficiencies have led to

contradictory interpretations by interested parties, resulting in a number of lawsuits around the country.

Grade B Intensity Signal

The Act provides that an "unserved household" is one that, in pertinent part: cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity (as defined by the Federal Communications Commission). . . .

17 U.S.C. § 119(d)(10)(A). The Federal Communications Commission has no explicit definition of a "signal of grade B intensity." In section 73.683(a) of its rules, the FCC does set forth required median field strengths (in dBu) associated with the Grade A and Grade B contours for the various VHF and UHF channels. This subsection reads in its entirety as follows:

In the authorization of TV stations, two field strength contours are considered. These are specified as Grade A and Grade B and indicate the approximate extent of coverage over average terrain in the absence of interference from other television stations. Under actual conditions, the true coverage may vary greatly from these estimates because the terrain over any specific path is expected to be different from the average terrain on which the field strength charts were based. The required field strength, $F(50,50)$, in dB above one micro-volt per meter (dBu) for the Grade A and Grade B contours are as follows:

	Grade A (dBu)	Grade B (dBu)
Channels 2-6	68	47
Channels 7-13	71	56
Channels 14-69	74	64

47 C.F.R 73.683(a). As I shall explain below, these dBu values and their associated contours are imprecise statistical concepts that were not intended to, and do not, enable one

to make a judgment about the television reception of a viewer in any particular household. Moreover, the existence or non-existence of a median field strength associated with the Grade B contour has nothing to do with the "use of a conventional outdoor rooftop receiving antenna."

History and Purpose of the Grade B Standard

In the early 1950s, the Federal Communications Commission was developing a national plan for the allocation of television broadcast channels. As part of that effort the Commission had to adopt basic planning parameters, namely the maximum permissible heights of broadcast transmitting antennas, their maximum permissible radiated powers, and the minimum permissible mileage spacings between stations operating on the same and adjacent channels. Those three parameters, and the amount of allocated radio spectrum, would determine the number of stations which could be accommodated in the television band, the density of stations that could be assigned in any given area, and the general service areas of individual stations.

As part of the process of selecting a set of values for these planning parameters, the Commission and its staff, in consultation with industry, developed a model using standardized radio-frequency propagation curves, a set of technical planning factors, and a standard criterion of service. The planning factors were used to calculate the strength of the radio signal (or signals) that was needed to satisfy the standard criterion of service described below. The propagation curves showed how far these signals would extend from a transmitting station over average terrain under various combinations of antenna power and height. If, for example, it was decided that a signal strength of 47 dBu was needed to produce an acceptable picture, then the propagation curves could be used to compare how far that 47 dBu signal would extend from a station using 50 kilowatts of power and an antenna 500 feet above the ground with the coverage of another station using 100 kilowatts of power and a 1000 foot antenna height. This process can be extended to many other combinations of power and height. Finally, this data, taken in conjunction with

demographics, interference criteria, public comments, and other factors, enabled the Commission formally to adopt appropriate values for station separations, powers, and heights, and to develop a nationwide assignment plan, which it did in 1952.

The Standard Criterion of Service

As part of its effort to establish what has become the current television broadcast service, the Commission developed the concept of two levels of television service, known as Grade A and Grade B. These levels have been accurately summarized as follows:

Grade A represents a specific value of *ambient median field strength* existing 30 feet above ground which is deemed to be sufficiently strong, in the absence of interference from other stations, but with due consideration given to man-made noise typical of urban areas, to provide a picture which the median observer would classify as of "acceptable quality," assuming a receiving installation (antenna, transmission line and receiver) considered to be typical of suburban or not too distant areas. The signal level is sufficiently strong to provide such a picture at least 90 percent of the time at the best 70 percent of receiving locations. The Grade A contour represents the outer geographic limits within which the median field strength equals or exceeds the Grade A value.

Grade B represents a specific value of *ambient median field strength* existing 30 feet above ground which is deemed to be sufficiently strong, in the absence of man-made noise or interference from other stations, to provide a picture which the median observer would classify as of "acceptable quality," assuming a receiving installation (antenna, transmission line and receiver) considered to be typical of outlying or near fringe areas. The signal level is sufficiently strong to provide such a picture at least 90 percent of the time at the best 50 percent of receiving locations. The Grade B contour represents the outer geographic limits within which the median field strength equals or exceeds the Grade B value.

Robert A. O'Connor, Understanding Television's Grade A and Grade B Service Contours, IEEE Transactions on Broadcasting, Vol. BC-14, No. 4, at 137 (1968)(emphasis added).

The standard criterion of service is the availability of a desired signal, free of interference, for at least 90% of the time. For both Grade A and B, the desired signal was one thought to provide a picture whose quality was "acceptable" to the median viewer. For Grade A service those conditions must be met for the best 70% of receiving locations. For

Grade B service those conditions must be met for the best 50% of receiving locations. The Grade A service area is the area between a broadcast station's transmitter and its Grade A contour. The Grade B service area is the area within the station's Grade B contour but outside its Grade A contour. Under average conditions, the Grade B service area takes the form of a ring or doughnut. Grade A service assumes a typical receiving installation located within a typical urban or suburban area with an appreciable amount of man-made noise present. This man-made noise is electrical noise which may degrade the quality of the picture or sound carried on a television signal. The sources of man-made noise are numerous and include such things as power line transformers, automobile ignition systems, video games, hair dryers, mobile radios, paging systems, electric razors, appliance motors, garage door openers, and fish tank heaters. The noise may be continuous or intermittent. It tends to be more pervasive the closer people live to one another. Grade B service assumes a typical receiving installation appropriate for a rural area with no significant man-made noise present.

The planning factors reflect these conceptual differences. See Third Notice of Further Proposed Rule Making, Federal Communications Commission, Docket Nos. 8736, 8975, 9175, 8976 (March 22, 1951). The following table shows the planning factor values for television channels 2 through 6. (There are corresponding values, which are of no immediate concern here, for the other television channels.) The numbers are given in decibels (dB). The totals shown at the bottom of the table are the desired signal strengths associated with the Grade A and Grade B contours in decibels above one microvolt per meter (abbreviated dBu) at a reference height of 30 feet above the ground. (This particular height is a standard used for comparing measurement data or in making predictions with the Commission's propagation curves. It does not imply that receiving antennas are or should be at this height. Generally, signal intensity at 15 or 20 feet will be appreciably less than at 30 feet.)

PLANNING FACTORS CHANNELS 2-6

	<u>FACTORS</u>	<u>GRADE A</u>	<u>GRADE B</u>
1.	Thermal Noise	7	7
2.	Receiver Noise	12	12
3.	Carrier to Noise Ratio	30	30
4.	Transmission Line Loss	1	1
5.	Dipole Factor	-3	-3
	SUBTOTAL	47	47
6.	Location Factor (70%)	4	0
7.	Time Fading Factor	3	6
	SUBTOTAL	54	53
8.	Receiving Antenna Gain Factor	0	-6
9.	Man-Made Noise Factor	14	0
	TOTAL	68 dBu	47 dBu

Planning Factors One Through Six

The first three factors determine the amount of signal needed to overcome the electrical noise inherent in a receiver. The fourth factor is an allowance for some loss of signal strength in the line connecting the antenna with the receiver. The fifth (or dipole) factor is obtained from a standard formula which converts or relates the ambient field strength of an electromagnetic signal to the voltage of the transmission line at the output of a reference half-wave dipole antenna. The first subtotal shows that the Commission assumed that a broadcast signal must be at least 47 dBu to produce an "acceptable picture" in a receiver connected to a dipole antenna.

In the sixth factor, the Commission added 4 dB to the Grade A column to raise the desired extent of service within the Grade A contour from 50% of locations to 70% of

locations. The Commission specified the Grade A service area in such a way that a higher percentage of households (70% rather than 50%) would receive the appropriate signal. This 4 dB adjustment was intended to achieve this differential in service.

Planning Factor Seven: Compensation for Seasonal and Diurnal Variations

The seventh factor takes into account the fact that VHF and UHF signals vary with time of day and time of year. At distances associated with Grade B service (for VHF channels) under average conditions, a signal will vary with the season and the time of day approximately plus or minus 8 dB (a range of 16 dB). Robert O'Connor, author of a leading guide to the Commission's field-strength contours, notes:

It is a well-known phenomenon that VHF and UHF fields vary with time, diurnally and seasonally, at a given location.... It is an equally well known phenomenon that VHF and UHF fields vary with location at any given distance from the transmitter. By virtue of the relatively short wavelengths involved, it is quite common for the field strength to vary several dB over a relatively short distance of a few yards.

O'Connor, *supra* note 3, at 141.

The Commission's propagation curves used for predicting the coverage of a broadcast station are based on median values. That is, for any given distance from the transmitter, the curves predict the value of field strength expected to be exceeded at half of the receiving locations, for at least half of the time. By definition, then, at the Grade B contour, the signal is expected to exceed 47 dBu for at least 50% of the time, at half the locations. At the other half of the locations, the signal will fail to meet these criteria. The standard criterion of service for both Grade A and Grade B specifies that the desired signal must be available 90% of the time (as opposed to the 50% parameter used in the Commission's propagation curves, as described above). To reach this 90% level, the required median field strength must be increased by an appropriate amount. From the Grade B column we see that the Commission decided that a 6 dB increase was needed to compensate for time fading--that is, for diurnal and seasonal variations that cause the signal

to drop beneath the level necessary for an acceptable picture. The second subtotal therefore means that a television signal must have a median field strength of 53 dBu to ensure that the signal, in spite of seasonal and diurnal variations, exceeds 47 dBu for 90% of the time. Corresponding adjustments were made to the Grade A specification to define the median signal strength needed to produce an acceptable picture for 90% of the time. The time fading factor for Grade A is smaller (3 dB as opposed to 6 dB) because the Grade A contour is closer to the transmitter than the Grade B contour; at those reduced distances the signal does not vary as much seasonally or temporally from the median value as it does at the Grade B contour.

Planning Factor Eight: Antenna Gain

The last two planning factors (receiving antenna gain and man-made noise) account for the major numerical and conceptual differences between Grade A service and Grade B service. It is assumed that rural viewers in the Grade B service area will employ an antenna with 6 dB of gain (improvement) over the reference antenna (which, by definition, has zero relative gain). This means that a lower signal intensity (47 dBu rather than 53 dBu) will satisfy the standard criterion for service in the Grade B service area, because the antenna at a Grade B service area location can be assumed to "boost" the received signal up to the 53 dBu target level. "Grade B Receiving Antenna Gain Factor" is shown as a negative quantity because it reduces the level of signal needed for service. Because antennas with 6 dB of gain tend to be large and unwieldy, particularly at VHF frequencies, we may infer that the Commission assumed that viewers in the Grade B service areas would employ rooftop antennas. In contrast, viewers in the Grade A service area are assumed to have an antenna that is no better or worse than the reference dipole. It is not clear from the planning factors what type of antenna the Commission assumed viewers in the more densely populated Grade A service area would use. However, the choice of zero dB of gain is not consistent with the characteristics of outdoor rooftop antennas.

Planning Factor Nine: Man-Made Noise

In urban and suburban areas (including the Grade A service area), the presence of man-made noise means the signal intensity must be higher (68 dBu rather than 54 dBu) to overcome interference caused by such noise and thereby to produce a signal that satisfies the standard criterion for service. As noted earlier, man-made noise emanates from a wide variety of sources. The planning factors make no adjustment for man-made noise in the Grade B (rural) service area and thus assume a noise-free environment in that service area. However, a 1977 review of the technical planning factors, in a document released by the Office of the Chief Engineer of the Commission, pointed out that this assumption is now open to question:

Large population shifts, from cities to suburban areas, in many parts of the country, cause the Grade B contours in these areas to no longer lie in "rural areas." The assumption of 0 dB to overcome rural noise in these "rural areas" is probably no longer valid because of the increased number of high voltage lines and motor vehicle traffic volume.

Research & Standards Division, Office of Chief Engineer, Federal Communications Commission, "A Review of the Technical Planning Factors for VHF Television Service, March 1, 1977, page 11 (attached hereto as Exhibit B).

The Field Strength Values Associated with the Grade B Contour or Grade B Service Were Not Intended To Be and Are Not a Reliable Indicator of Service at Any Given Household.

The field strength values associated with Grade B service are not a reliable indicator of service at any particular household and were never intended by the FCC to indicate such service. Rather, the field strength values associated with Grade A and B contours and service areas were essentially broad planning concepts, useful primarily in estimating the overall reach or coverage of a broadcast signal. It is essential to recognize that the field strength values are median values. Moreover, the contours and associated field strengths assume no interference from other television stations (i.e., co-channel or adjacent channel interference). In practice, however, these phenomena are common. As

Rule 73.683(b) points out, "the actual extent of service will usually be less than indicated by these estimates due to interference from other stations." Nor do the field strength values take into account multipath interference, or ghosting, which can significantly impair the quality of a broadcast signal.

Multipath interference, which is quite common, arises due to reflections of broadcast signals from buildings, metal objects, hills ~~and~~ even flat ground. These reflections mean that a broadcast signal can follow different paths before arriving at a receiver. For example, one portion of a broadcast signal may travel in a straight line from the transmitter to a receiver. Another portion of the signal may be reflected by an overflying aircraft and arrive at that same receiver from a different direction delayed in time because of the longer path. Multiple delayed signals can give rise to ghosting: that is, the appearance of second ghost-like images on a television screen. A viewer may also receive two different pictures simultaneously from two different stations operating on the same television channel. The screen may show multiple distorted images. In that case, even if the preferred signal is above 47 dBu, the viewer is not getting an acceptable picture.

Because of their limited utility, the Commission's rules expressly provide that the field strength contours will be considered for the following purposes only:

- 1) In the estimation of coverage resulting from the selection of a particular transmitter site by an applicant for a TV station.
- 2) In connection with problems of coverage arising out of application of [multiple ownership rules].
- (3) In determining compliance with § 73.685(a) concerning the minimum signal field strength to be provided over the principal community to be served.

47 C.F.R. § 73.683(c).

The Inclusion of the Phrase, "Cannot Receive ... Through the Use of a Conventional Outdoor Rooftop Antenna," Suggests that a Household that Cannot Actually Receive an Acceptable Picture is Unserved Under the Act.

As noted above, the required field strength for a Grade B contour, set forth in Rule 73.683(a) represents a specific value of ambient median field strength existing 30 feet above the ground produced by a broadcast transmitter. Its existence has nothing to do with the presence or absence of a conventional rooftop antenna. The inclusion of the concept of a conventional rooftop antenna suggests that a household be able to receive an *acceptable* picture and not merely be situated in or near an electromagnetic field of a given strength. If the test for service is merely the presence or absence of a signal of a certain intensity at, above, or in the general vicinity of a household, then the reference to a conventional rooftop antenna serves no purpose. The inclusion of this reference to a conventional rooftop antenna by Congress strongly suggests that the statute intended that an evaluation of service must do more than simply examine the ambient median field strength. Such measurement does not account for multipath interference, adjacent or co-channel interference, noise, diurnal or seasonal variations or other factors. One must correlate the technical data with the evidence that the signal measured is or is not usable and reliable before drawing a conclusion. Accordingly, the Act should be modified to clarify that households that cannot receive an acceptable picture are unserved.

Beyond the ambiguity inherent in the term "signal of grade B intensity," the Act's eligibility standard gives rise to several additional uncertainties. For example, the qualifier "conventional" gives no definite indication of what sort of receive antenna Congress had in mind. Performance of home antennas varies across a wide range, with a major impact on the strength and quality of signals a household can receive. Additionally, performance of these antennas need not correlate with their price. As a second example, antenna orientation has a great impact on reception of a signal, yet the Act does not prescribe how they should be oriented for eligibility purposes. Householders might make a reasonable decision to orient the antenna in order to "compromise" reception of two or

more stations with transmitters situated in different locations. Such a compromise would diminish the reception of each signal in question, yet the Act offers no guidance regarding treatment of this type of tradeoff.

The Field Strength Values Associated with "Grade B" Service Are Applicable, if at all, Only in Rural, Outlying, or Fringe Areas and Have No Relevance to Areas Within the Grade A Contour.

In instances when it is found useful to employ Grade A and B service concepts, it should be kept in mind that the distinction between the two service areas is appreciable. A median signal of, for example, 52 dBu might provide an acceptable picture in a Grade B (rural) service area. That same field strength is unacceptably low in a Grade A (urban/suburban) service area or in urban or suburban areas within the Grade B contour which contain significant man-made noise. To the extent that the field strength values associated with the Grade B contour are relevant to eligibility under the Act, such values can have no applicability within Grade A service areas or other areas with significant man-made noise.

The Field Strength Measurement Procedure Set Forth in the Commission's Rules Are Inadequate for a Determination of Service Under the Act.

The Act does not provide any guidelines for how to measure its eligibility standard and does not point to any authority on how to conduct such a measurement. To my knowledge, the FCC has not been asked to develop any such guidelines. The FCC, in section 73.686 of its rules and regulations, calls for measurements either along radials drawn from a station's transmitting location, or at intersections of a grid drawn over the relevant community. Measurements are to be taken over a horizontal run of 100 feet, if feasible, or in clusters, with the measurement antenna elevated 30 feet above the ground. This methodology is designed to produce unbiased data indicative of a station's signal coverage over broad areas.

In my opinion, the established TV field strength measurement procedures in FCC Rule 73.686 were not intended to evaluate the particular television reception of any given household. In its licensing process the Commission examines a broadcast station application to determine if the station's predicted city grade contour (equal to Grade A value plus 6 dBu) will cover its community of license, and if the proposed facilities comply with regulations on power, height, and spacing. It is taken for granted that the actual coverage will depart from predicted service to a greater or lesser degree, that some households outside the predicted service areas will receive acceptable pictures, that some households inside predicted service areas will not receive acceptable picture and the quality of service will vary throughout the service areas.

In considering applications for licenses and permits, questions will occasionally arise as to whether a station's coverage in a particular area is significantly better or worse than predicted. For example, if a station proposes to move its transmitter to a new location, opponents may argue that the move may deprive an area, perhaps a small community, of its only network television service. In turn, the station may argue that local conditions are such that its actual coverage is better than predicted and that the small community will retain its service in spite of the transmitter move. The parties may then resort to actual field strength measurements to resolve the issue. The accepted measurement procedures are defined to produce sufficient unbiased data that will allow the Commission confidently to decide whether a given area does or does not receive the disputed service. To my knowledge, the Commission has never examined the question of whether a particular household does or does not receive television service, has never approved a procedure for making such a determination and would have no use for such information.

It is important to recognize that, as described above, the values for the Grade A and B contours are median values and represent the average of many values over a long period of time. Measurements of the signal intensity along a 100-foot path 30 feet above the ground, cluster measurement taken at and around a point 30 feet above the ground, or

measurements made at some alternative height, are all essentially one-time samples. They are indicative of the characteristics of the signal available in the immediate area of the measurement at the time taken and, when combined with other samples, indicative of the general service provided by the station. However, the one-time measurement of a signal in the vicinity of a household does not permit one to conclude that the household will receive an acceptable picture 90% of the time using a conventional outdoor rooftop antenna. To determine what the actual median field strength is at a location requires repeated measurements over a long period of time. Further, measurements must be validated by actual observation of the television picture received at the household. Single, one-time, unvalidated measurements are inconclusive.

Alternative Approach to Assessment

The quality of television reception, on a household by household basis, cannot be reduced to a single technical parameter any more than safety in an automobile can be assured by focusing on one element such as treadwear. Any attempt to do so would have to ignore too many germane factors; the results would be artificial and misleading. A comprehensive measurement and evaluation procedure could, in theory, be developed but its implementation would probably be too intrusive and would certainly be very costly.

If some form of systematic assessment is believed necessary, then a two-step approach might be more feasible. Potential satellite subscribers could be asked to affirm on a standard form that terrestrial reception is not acceptable. The form would also instruct the subscriber to indicate which of various listed problems (ghosting, interference, etc.) are applicable. If the terrestrial broadcaster disputes the subscriber's evaluation, an expert with local knowledge and experience, such as a television installer, would be called on to resolve the matter. The losing party (the broadcaster or satellite provider) would pay the local expert's fee.

Admittedly this approach relies on the judgment of the local expert, although presumably this person is experienced in a broad range of local television problems. But it

is comprehensive, reasonably unbiased, relatively fast, and far less expensive than making signal-intensity measurements.

Conclusion

In summary, I conclude that:

- Neither Congress nor the Federal Communications Commission has provided an explicit definition of an "over-the-air signal of grade B intensity."
- The field strength values associated with "Grade B" service were not intended to be, and are not, a reliable indicator of television reception at any given household.
- The field strength values associated with "Grade B" service are applicable only in rural, outlying, fringe, and noise-free areas; those values have no significance to areas within the Grade A contour or to urban or suburban areas generally.
- The inclusion in the Act of the phrase, "cannot receive ... through the use of a conventional outdoor rooftop antenna," suggests that a household that cannot actually receive an acceptable picture is an "unserved household" under the Act.
- The field strength measurement procedure set forth in section 73.686 of the Commission's rules are inadequate for determining whether a household is an "unserved household" under the Act.
- An alternative means of eligibility assessment could be developed that would be comprehensive, reasonably unbiased, faster, and less costly than efforts to measure signal intensity.

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**GENERAL COUNSEL
OF COPYRIGHT**

APR 28

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Re: Revision of the Cable and Satellite Carrier Compulsory
Licenses, Docket No. 97-1

Dear Ms. Petruzelli:

Transmitted herewith for filing on behalf of the National Association of Broadcasters are an original and fifteen copies of (1) the Comments and Testimony of the National Association of Broadcasters, and (2) Suggested Questions for Witnesses in the above-captioned proceeding.

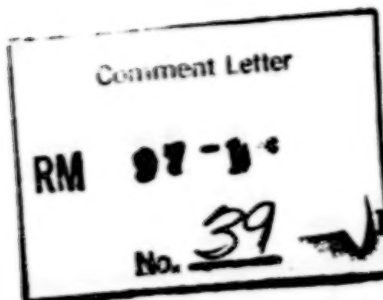
Should there be any questions regarding this matter, please communicate with this office.

Very truly yours,



John I. Stewart, Jr.

Enclosures



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GENERAL COUNSEL
OF COPYRIGHT

APR 28 1997

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In the Matter of)

Revision of the Cable and Satellite)
Carrier Compulsory Licenses;)
Public Meetings)

Docket No. 97-1

**COMMENTS AND TESTIMONY OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters ("NAB") files these Comments and Testimony in response to the Notice issued by the Copyright Office on March 20, 1997, 62 Fed. Reg. 13396 (the "Notice"), regarding the possible revision of the cable and satellite carrier compulsory licenses set forth in Sections 111 and 119 of the Copyright Act.

NAB is an incorporated association of radio and television stations and broadcast networks, which serves and represents the broadcast industry. In the context of the Copyright Act, broadcast stations engage in the "primary transmissions" of the copyrighted works whose secondary retransmission the cable and satellite compulsory licenses permit. The retransmitted stations are themselves copyright owners of works embodied in the secondary retransmissions. For nearly twenty years, since the very first Copyright Royalty Tribunal

proceeding under the Copyright Act of 1976, NAB has participated on behalf of all U.S. commercial broadcast stations in proceedings to set the rates and distribute the royalties under the cable compulsory license. During that time, NAB has distributed nearly 100 million dollars in royalties to stations for the retransmission of their programs by cable systems.

Commercial television stations operate within the advertiser-supported free broadcast system that Congress has consistently found important, as the Supreme Court recently acknowledged, in providing the "information from diverse and antagonistic sources" whose dissemination is "essential to the welfare of the public." Turner Broadcasting System, Inc. v. FCC, 95-992 slip op. at 9 (U.S. March 31, 1997), *quoting* Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 663-64 (1994), *quoting* United States v. Midwest Video Corp., 406 U.S. 649, 668, n.27 (1972) (plurality opinion), *quoting* Associated Press v. United States, 326 U.S. 1, 20 (1945). Broadcasters both create the core news and informational programming that is so important to the working of our democratic society and compile a consumer-friendly broadcast schedule of sports, entertainment, and other programming that appeals to television viewers.

Key to this unique American system of free broadcasting is the principle of exclusivity. The economic system that makes free broadcasting possible is grounded in the ability of each broadcaster to be, through its own programming efforts, through marketplace negotiations with others, and through the provisions of Sections 501(c)-(e) of the Copyright Act, free from competition from

unauthorized retransmissions of the same programs by third parties into the station's market. The importance of being the sole source of programming is increasing in today's multi-channel video environment, where single-channel broadcasters must compete with retransmission services offering dozens or even hundreds of channels of video programming. The extent to which broadcasting can and should be subject to competition from other sources of other programming, such as non-broadcast programming delivered by cable systems and satellite services, is a matter of communications policy. But the protection of the rights of broadcast stations in their own programs should remain a central part of the Copyright Act provisions addressing the secondary retransmission of broadcast stations' primary transmissions.

NAB's views on the questions raised by the Copyright Office in its Notice are built upon these twin roles of stations as owners of works subject to the compulsory license and primary transmitters of works in an exclusivity-based free broadcasting market. Its responses to the Office's questions follow.

A. BASIC PRINCIPLES

1. Need for compulsory licenses.

The Notice first asks for comment on the continuing justification for any compulsory licenses. It is obvious that since the adoption of the cable and satellite licenses in 1976 and 1988 the cable and satellite industries have become established and have continued to grow exponentially. But even in this

established market, broadcast stations remain the most important source of programming in cable and satellite subscriber homes. See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Third Annual Report, FCC 96-496, at ¶ 86 (released Jan. 2, 1997) (viewing to broadcast stations represents 61% share of viewing in cable households). In addition, localism remains an important federal policy. As Congress found in 1992 in mandating that cable systems carry all qualified local commercial television stations:

- The Federal Government has a substantial interest in having cable systems carry the signals of local commercial television stations because the carriage of such signals is necessary to serve the goals contained in section 307(b) of the Communications Act of 1934 of providing a fair, efficient, and equitable distribution of broadcast services.
- A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation.
- Broadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate.

Cable Television Consumer Protection and Competition Act of 1992, P.L. 102-385, §§ 2(a)(9), (10), (11). These findings were given substantial deference by the Supreme Court when it recently affirmed those cable must carry rules. Turner Broadcasting System, Inc. v. FCC, 95-992, slip op. at 9-10, 12-13 (U.S. March 31, 1997). And ASkyB has emphatically argued the critical necessity of including local broadcast stations in its multichannel service offering. See Heather Fleming,

Sky Goes to Capitol Hill for Quick Copyright Fix, Broadcasting & Cable, Mar. 17, 1997, at 35. In today's mega-multichannel environment, protecting program exclusivity and insuring the station's availability in the local market become even more crucial than in 1976.

Moreover, in the nearly twenty years since the cable compulsory license first went into effect, the broadcasting and programming industries have made adjustments to accommodate it. These adjustments have become part of the marketplace, and, although NAB remains unsatisfied with the cost of collecting royalties and the relative amount of the royalties received by station copyright owners through the CARP process, eliminating the compulsory licenses at this point would require substantial and costly modifications to existing marketplace mechanisms. Moreover, to the extent the elimination of the compulsory licenses would impair the ability of broadcasters to reach all households within their local markets, it would erode the continuing effectiveness of our unique American system of free local broadcasting.

Q. Is there a continuing need for the cable and satellite licenses, or should cable and/or satellite carriers be required to negotiate the licensing of broadcast programming in the free marketplace?

Answer: In light of the critical importance of protecting our free over-the-air local broadcasting system, NAB supports the continuation of the cable compulsory license. As explained in further detail below, NAB believes that the satellite compulsory license, by contrast, should not be continued unless and until

satellite carriers demonstrate their commitment to complying with the conditions of that license, which Congress imposed to assure the protection of free over-the-air broadcasting. Even if it were continued, the satellite license should be modified and its requirements strengthened to protect broadcasters' exclusive copyright interests.

2. Expansion and Revision of Compulsory Licenses

The Notice next asks for comment on whether and how the compulsory licenses should be expanded or revised to allow new technologies to retransmit broadcast station signals. It asks whether new distribution systems should be accommodated within the existing compulsory license, whether the separate cable and satellite licenses should be unified, and whether the rate structure for either license should be modified.

As a basic principle, compulsory licenses should be considered only on a case-by-case basis, with appropriate restrictions imposed to reflect the risks and capabilities peculiar to the distribution technology. Congress adopted the cable and satellite licenses with differing terms in light of the applicable communications regulatory schemes and the differing technical and economic attributes of the two services. In the same way, Internet retransmissions, which are not tied to any geographical market, and OVS, which may be closer to the cable model, present radically different considerations with respect to protecting local exclusivity. A unitary license would allow new technologies to be added into

the compulsory license regime without the opportunity to consider and deal with their technology-specific characteristics, and should thus be rejected.

It is appropriate, however, at this time in the development of the satellite industry, to impose some equalizing measures across the cable and satellite licenses. In particular, as discussed in Section C.1. below, program exclusivity requirements for satellite carriers comparable to cable syndex rules should be imposed. They can and should be incorporated into the Copyright Act.

Q. Should new types of broadcast retransmission services, such as open video systems provided by telephone companies and retransmission services via the Internet, have their own separate compulsory licenses? Or, is it better to place these services in the existing compulsory license structure?

Answer: It is critical that there be no "generic" compulsory license for the retransmission of broadcast stations. Each of the existing compulsory licenses was a carefully crafted compromise between the copyright owner interests and the retransmission service. As the Copyright Office has previously described, the process that led to the adoption of the cable compulsory license in 1976 began more than ten years prior to that time, and involved the active participation of cable interests, broadcasters, and other copyright owner interests, as well as the FCC and the courts. See The Cable and Satellite Carrier Compulsory Licenses: An Overview and Analysis. Report of the Register of Copyrights, at 5-25 (March 1992). While the enactment of the satellite license consumed fewer years, it involved a similar balancing of interests, and the unique form of the license clearly reflects that balancing. See id. at 95-110.

Each new technology must likewise be considered carefully before determining whether a compulsory license is warranted at all and, if so, what specific conditions must be imposed. With respect to Open Video Systems, NAB believes, as it stated in its Comments and Reply Comments in Docket 96-2, which are hereby incorporated by reference, that such systems, because of their local market-based structure and their being subject to the FCC's must carry, syndicated exclusivity, sports exclusivity, and network non-duplication rules, will operate in a fashion so functionally similar to cable systems as to justify the applicability of the Section 111 compulsory license to them. By contrast, "retransmission services via the Internet" are subject to no such local market-based regulatory restrictions, and granting a compulsory license to such services would directly and substantially threaten free broadcasting. No compulsory license should be considered or recommended for such services.

Q. Should the cable and satellite licenses be unified into a single compulsory license applicable to all retransmission providers?

Answer: As explained above, each technology presents different questions about whether a compulsory license should be granted and, if so, under what conditions. The satellite license is subject to "white area" restrictions not applicable to cable systems. Given their history of massive violations, discussed below, satellite carriers need to prove that they will in fact comply with those restrictions before Congress should even consider extending the satellite license past 1999. Other satellite-specific modifications should also be made, as

discussed below. Thus, NAB believes that the satellite license, if it is extended, should remain a separate license.

Q. If the cable and satellite carrier compulsory licenses remain separate, should the royalty rates paid under both licenses be equalized?

Answer: NAB believes that there is no compelling reason to change the status quo with respect to the cable and satellite rate structures. If it were nonetheless determined that the rate structures for the separate licenses should be modified to make them similar, that modification should be done in such a way that it does not produce radical changes in carriage patterns. For example, in a pending CARP proceeding in which NAB is not a party, the satellite rates are being adjusted to bring them into line with fair market value. The cable "3.75" rate applicable to some distant signals was also intended more closely to reflect market value. To the extent the equalization of cable and satellite rates included any change in the 3.75 rate that would result in the significant expansion of distant signals being retransmitted into other television markets, such a change would threaten the ability of local stations to serve their local communities, to the detriment of important federal policies. NAB believes that no such change would be warranted.

With respect to the retransmission of stations within their local markets by satellite carriers, certain carriers have taken the position that such carriage is or should be subject to a compulsory license, and should be provided at a royalty rate of zero. NAB currently takes no position on whether such local retransmission is

permissible or should be made permissible under the Section 119 license. NAB believes, however, that any such compulsory license would be appropriate only to the extent that conditions are imposed that protect localism and exclusivity. In particular, local satellite retransmissions of signals should be subject to an "if any, then all" condition. That is, in order to qualify for the compulsory license in any particular television market, if the carrier proposes to carry any local station at all, it must carry all television stations licensed to communities in that market. As explained further below, NAB believes that such a condition could properly be imposed as part of the compulsory license under the Copyright Act.

3. Must Carry

The Notice posed a number of questions about the effect of the then-anticipated Supreme Court decision on the must-carry rules. That decision has now been issued. See Turner Broadcasting System, Inc. v. FCC, 95-992, slip.op. (U.S. March 31, 1997).

Q. If the Court upholds must-carry, should must-carry be extended to the satellite carrier compulsory license and the provision of local network signals, as well as all other broadcast retransmission services seeking compulsory licensing?

Answer: The continuing availability of local broadcast stations within their local markets remains at the core of federal policy interests vis-a-vis retransmission services. The question of whether to impose broadly applicable must carry rules may present issues that concern communications as well as

copyright policies. But Congress has previously incorporated conditions into the cable compulsory license that protect federal interests in localism and exclusivity. For example, Section 111 conditions the availability of the compulsory license on the system's retransmitting the works transmitted by the station (along with any commercial advertising and station announcements) in their entirety, without change, deletion, or addition, 17 U.S.C. § 111(c)(3), and on compliance with FCC rules, which have included must carry rules and distant signal carriage limits, see id. § 111(c)(1). Congress has also provided in the Copyright Act for adjustments to compulsory license rates in response to changes in FCC rules regarding the numbers of signals that may be carried, and rules regarding syndicated and sports program exclusivity. Id. §§ 801 (b)(2)(B), (C).

In the same way, Congress could condition the availability of a compulsory license for the satellite retransmission of television stations into their local markets on the carriage of all stations licensed to the market. It could also impose further conditions on the manner of carriage (including channel position, picture quality, and inclusion in channel guides) that may be necessary to protect interests in localism and exclusivity. Compliance with the conditions could be enforced not only by other copyright owners but also by local stations in the market, as is now the case under Sections 501(c) and (d) of the Act with respect to cable system violations of the conditions set out in Section 111(c) and under Section 501(e) with regard to "white area" violations.

With respect to open video services provided by telephone companies, the

FCC has already ruled that the must carry rules are applicable to OVS systems. As explained in NAB's Comments in Docket No. 96-2, the Section 111 license should be held to cover OVS systems to the extent they operate like local cable systems. Under the terms of Section 111, the compulsory license will be applicable only to the extent carriage of local stations is in compliance with the FCC's rules, including its must carry rules.

B. CABLE COMPULSORY LICENSE

1. Cable Regulation and Rates

The Notice's next section addresses various technical amendments to the cable compulsory license, assuming it will continue in existence. NAB believes that although the current system, which has developed through successive regulatory changes, is complex, it has become integrated into marketplace structures and relationships. Modification in pursuit of simplification would likely produce a complicated mess, as myriad carriage situations were reassessed and restructured. Changes in carriage patterns and/or renegotiations of carriage agreements could have a significant economic impact on the industry. In the absence of compelling evidence that the present system does not work (which may be difficult to show in light of the tens of thousands of carriage decisions that continue successfully to be made), NAB believes that it should generally not be modified.

Q. Should the cable compulsory license be reformed to reflect the current marketplace and regulatory framework?

Answer: With the amendment in 1994 of the Section 111(f) definition of "local service area" to encompass the area within which a station may currently assert must carry rights, including any modifications that may be adopted by the FCC under procedures mandated by the Communications Act, the Copyright Act now reflects the current marketplace¹ and regulatory framework. The retention of the alternative local service area definition, based on 1976 must carry rules, is also appropriate, since the number of circumstances that now fall into this category is relatively small, and such circumstances represent longstanding carriage relationships that should not be disrupted absent a compelling justification.

Q. Should the royalty payment scheme of the license, based upon each cable system's gross receipts for the retransmission of broadcast signals, be simplified so as to remove reliance upon outdated FCC rules?

Answer: The current system appears to be working, and is the basis for marketplace structures and relationships that have developed over a period of many years. In particular, the rules that determine whether a system must pay the 3.75 rate for retransmission of a distant signal are based on FCC rules that promoted localism and exclusivity in the broadcast marketplace. The elimination

¹ The FCC continues to use outdated Arbitron "ADI" market definitions, but will base market definitions on more current Nielsen "DMA" designations beginning in 1999.

or modification of that aspect of the cable rate structure in a way that would significantly change distant signal carriage patterns would threaten those important federal policy interests. Without a compelling justification for doing so, this fundamental aspect of the cable rate structure also should not be changed.

2. Radio Retransmissions

The Notice next raises questions regarding cable carriage of radio stations in light of the imminent authorization of digital over-the-air radio service. NAB believes that all radio broadcast stations should be treated the same under the cable compulsory license, whether they use digital or analog transmitters.

Q. Does the cable license need to be amended to accommodate retransmission of these [digital radio] services, and should all broadcast retransmission services be allowed to carry radio as well as television broadcast signals?

Answer: The cable compulsory license as presently worded permits the retransmission of any "primary transmission made by a broadcast station licensed by the Federal Communications Commission." 17 U.S.C. § 111(c)(1).² This would cover all licensed radio broadcast stations, regardless of whether they use a digital or an analog transmitter to broadcast their signal. There is thus no need to amend the cable compulsory license with respect to digital radio broadcast

² Section 111(c)(1) makes the availability of the compulsory license subject to section 114(d) of the Act, which provides that certain retransmissions of digital radio broadcast station transmissions do not infringe public performance rights in sound recordings.

stations.

Certainly, there can be no justification for prohibiting or penalizing cable carriage of radio stations within their local markets because they begin digital operations. The cable compulsory license for retransmission of radio stations should not, however, be extended to technologies that would broadly compromise those local markets.

3. New Retransmission Providers

The Notice next asks whether and how the cable compulsory license should be amended to accommodate new retransmission services. It lists satellite carriers, OVS operators and Internet retransmitters as potential additions. It also asks whether the cable license should be amended to assure "parity" among retransmitters in terms of the signals they may carry and the royalty payments they make.

NAB's general position has already been described above. The compulsory licenses were political and economic compromises that were worked out to accommodate the important interest in maintaining free broadcasting while allowing new distribution technologies to use broadcast station programming. New technologies should continue to be considered carefully on a case-by-case basis and should neither be presumed eligible for a compulsory license nor be merely "folded in" to an existing license. Extending an existing compulsory license on the same terms to new retransmission services may indeed not be justified, if

the characteristics of the particular technology warrant different conditions on its license.

Q. Is it appropriate to include these services [i.e., satellite carriers, wireless cable operators, and telephone companies providing broadcast retransmissions "*on video dialtone and open video system platforms*"], and other newcomers such as broadcast retransmissions via the Internet, within the cable compulsory license?

Answer: As explained above, there should be no general extension of the cable compulsory license to new distribution technologies. NAB believes that the satellite license, if it is to be continued, should remain a separate license subject to somewhat different conditions than cable. Whether telephone company retransmission services should be entitled to the cable compulsory license is determined by the extent to which they meet the Section 111 definition and are subject to the same kind of regulatory requirements that apply to cable systems. While open video systems do meet that definition, as NAB explained in its Comments in Docket 96-2, video dialtone services do not. Finally, Internet retransmission services should not be entitled to take advantage of the cable compulsory license under any circumstances, since their ultimate effect would be utterly to destroy localism and exclusivity.

Q. How can the cable license be amended so that all users of the license are in parity with one another in terms of the signals they are permitted to provide and the royalty amounts they pay for those signals? Should there be economic and/or regulatory caps on the number of distant broadcast signals that may be carried, or should all signals be paid for at the same rates?

Answer: Differences among competing retransmission services may be warranted. For example, "white area" restrictions are applicable to satellite carriers but not cable operators because of the service characteristics of the satellite systems. Royalty structures have also become integrated into the marketplace relationships of the various industries, and changing them for purposes of "parity" may actually create competitive disparities, given the differing cost structures and regulatory and technical constraints on the different distribution technologies.

NAB believes that a structural limit on the general extent of distant signal carriage is important to preserving localism and exclusivity. In general, an economic limit such as that represented by the 3.75 rate is preferable to a regulatory limit, since it can operate in a self-correcting fashion. For example, if a particular market has few broadcast signals available, and the value to a cable operator of providing an additional distant signal (subject to syndicated exclusivity protection) is high because there is substantial market demand for the additional signal, the cable operator can make the economic decision to pay the increased royalty and provide the signal. If there were instead a regulatory limit, it would be necessary to seek a waiver in order to carry the additional signal.

The 3.75 rate also appears to work well in this regard because it is expressed as a percentage of gross receipts, which is self-adjusting as the cable operator's revenues increase or decrease. If the "extra signal" rate were a flat fee, it would need to be reviewed and adjusted periodically so as to assure it was

neither too high to allow any additional carriage nor too low to operate as a limitation at all. The 3.75 rate, under which a fairly consistent level of carriage has occurred since 1983, appears to be effective as a self-adjusting limit.

C. THE SATELLITE CARRIER COMPULSORY LICENSE

Over the past few years, satellite carriers have flagrantly violated the Copyright Act by selling ABC, CBS, Fox, and NBC programming to large numbers of customers who are clearly ineligible to receive it. With the explosive growth in the satellite-to-home business since 1994, the carriers' indifference to the "unserved household" limitation imposed by Section 119 has posed an increasingly grave threat to the network/affiliate system. To address this threat, broadcasters have been working privately with the satellite industry over the past several months to develop procedures for enforcing the requirements of Section 119. Those efforts are on the verge of reaching fruition: most of the satellite industry has agreed in principle with broadcasters to a balanced set of procedures to enforce the "unserved household" limitation.

One carrier -- PrimeTime 24 -- has refused to join this industry agreement in principle. (Two of PrimeTime 24's distributors -- Echostar and Programmers Clearing House -- have agreed to join the agreement in principle.) The reason for PrimeTime 24's refusal to join the settlement is obvious: PrimeTime 24 is reaping enormous revenues by selling network programming on demand to large numbers of new (unlawful) subscribers every month. During January 1996 alone, for

example, PrimeTime 24 signed up some 120,000 new customers for its network station package.

Congress defined "unserved household" in Section 119 (with the carriers' approval) in 1988, and reaffirmed that definition (again with the carriers' approval) in 1994. Congress chose that definition because (1) it was the best objective test available, and (2) only an objective test could possibly be administered in practice. Both of those points are equally true today.

The radical legislative change advocated by PrimeTime 24 -- to abandon an objective standard in favor of a subjective, "picture quality" standard -- would be a grave mistake, for several reasons. *First*, the satellite industry is today rapidly moving towards marketplace solutions to the problem of making local network stations available to dish owners -- a "win/win" development for viewers, satellite companies, and broadcasters alike. To expand a government-imposed compulsory license for distant stations would directly undercut these marketplace efforts. *Second*, a compulsory license based on a subjective "picture quality" standard would be virtually impossible to enforce: it would literally make a federal case out of every individual subscriber's ability to receive a subjectively "acceptable" quality picture. *Third*, adoption of a subjective standard would reward an infringer that has consciously decided to profit by breaking the existing law. (In fact, PrimeTime 24 has been sued in three different courts for its violations of the Act.)

1. **The Network/Affiliate Broadcast System**
and the "Unserved Household" Limitation

Over the past 50 years, Congress and the FCC have worked to foster the development of a national system of over-the-air broadcast stations to serve local communities around the country. In particular, Congress has long directed the FCC to promote "localism" in the broadcast industry to ensure that "all communities of appreciable size" have their own voice "as an outlet for local self-expression." United States v. Southwestern Cable Co., 392 U.S. 157, 173-74 (1968).

That policy has been extremely successful, largely because of the success of the partnership between broadcast networks -- ABC, CBS, NBC, and more recently Fox -- and affiliated television stations in markets across the country. This partnership enables local affiliate stations to offer a unique mix of national programming provided by networks, local programming produced by many stations, and syndicated programs acquired by stations from third parties.

A key source of revenues for local network affiliates is the sale of local advertising time during network programs such as "Home Improvement," "60 Minutes," "The X-Files," or "ER." Because network programs often command large audiences, the sale of local advertising slots during these programs is one of the most important ways in which stations earn revenues to stay in business and fund their local news, weather, and public affairs programming. Network programs also provide important "lead-in" audiences to local news shows (such as "11 O'Clock News") and other non-network programs.

A variety of technologies have been developed or planned -- including cable, satellite, and open video systems ("OVS") -- that, as a technical matter, enable third parties to retransmit distant network stations into the homes of local viewers. Whenever those technologies posed a risk to the network/affiliate system, Congress or the FCC (or both) has acted to ensure that the retransmission system does not import duplicative network programming from distant markets.

In the case of cable television, for example, the FCC has long imposed "network non-duplication" rules on cable systems. 47 C.F.R. §§ 76.92-76.97 (1996). As the Commission explained when it strengthened the network non-duplication rules in 1988:

"[I]mportation of duplicating network signals can have severe adverse effects on a station's audience. In 1982, network non-duplication protection was temporarily withdrawn from station KMIR-TV, Palm Springs. The local cable system imported another network signal from a larger market, with the result that KMIR-TV lost about one-half of its sign-on to sign-off audience. Loss of audience by affiliates undermines the value of network programming both to the affiliate and to the network. Thus, an effective non-duplication rule continues to be necessary."

Report and Order, In the Matter of Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, Gen. Docket No. 87-24, ¶ 117, 3 FCC Rcd. 5299, 5319 (released July 15, 1988), aff'd, 890 F.2d 1173 (D.C. Cir. 1989).

Similarly, when considering the possible entry by telephone companies into the multichannel video business through open video systems, Congress in 1996 specifically directed the FCC to apply its network nonduplication rules to OVS operators. Telecommunications Act of 1996, Pub. L. 104-104, § 653(b)(1)(D).

In the 1980s, satellites emerged as a new method of retransmitting broadcast stations to viewers. As with cable (and later with OVS), Congress immediately recognized that satellite retransmission, if not narrowly limited, could destroy the network/affiliate system that Congress and the FCC had carefully nurtured over many decades. In crafting a special compulsory license for the satellite carrier industry, therefore, Congress strictly limited the license to ensure that viewers in unserved households -- and no one else -- would be eligible to receive network stations by satellite. See Satellite Home Viewer[] Act of 1988, H.R. Rep. No. 100-887, pt. 2 at 20 (1988) ("The Committee intends [by Section 119] to . . . bring[] network programming to unserved areas while preserving the exclusivity that is an integral part of today's network-affiliate relationship.").

Congress knew that if it established a vague or debatable standard for "unserved households," enforcement of the law would be completely unworkable. (Indeed, Congress specifically considered -- and rejected -- a subjective, picture quality standard in 1988.) Congress therefore chose a strictly objective definition of which households qualify as "unserved." That objective definition has two parts:

Only households that do not receive a local signal of Grade B intensity.

First, a household qualifies as "unserved" with regard to a particular network only if it "cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with that network." 17 U.S.C. § 119(d)(10). As the 1988 House Judiciary Report makes

clear, "Grade B intensity" refers to the objective signal strength levels established by the FCC in 47 C.F.R. § 73.683(a). H.R. Rep. No. 100-887, at 26 (1988). In that regulation, the FCC has long defined Grade B intensity as a median signal strength level of 47 dBu for TV channels 2-4, 56 dBu for TV channels 7-13, and 64 dBu for TV channels 14-69.

In amending Section 119 in 1994, Congress reaffirmed that "Grade B intensity" is an objective standard. H.R. Rep. No. 103-703, at 13 (1994) ("This is an objective test, accomplished by actual measurement.") (emphasis added); S. Rep. No. 103-407, at 9 n.4 (1994) (grade B intensity is an "objective test") (emphasis added).

No cable within previous 90 days. Congress also specified that satellite carriers could serve only households that had not, within the previous 90 days, "subscribed to a cable system that provides the signal of a primary network station affiliated with that network." 17 U.S.C. § 119(d)(10)(B). That is, if a household has recently received (say) an ABC station from a cable system, it is ineligible to begin receiving a distant ABC signal from a satellite carrier. Because cable systems offer local network stations, the 90-day rule promotes localism by discouraging viewers from lightly switching to a retransmission system that provides only distant network stations.

Congress thus imposed clear, objective standards for which households may -- and which may not -- receive network programming by satellite. Both of these tests could easily be applied by satellite carriers using a properly designed

compliance system. First, it has long been possible to produce sophisticated maps, using the Longley-Rice methodology developed by U.S. Government engineers, that analyze terrain data to predict where a station's signal does (and does not) reach.³ Indeed, these maps form the foundation for the "red light/green light" procedures to which the settling satellite carriers have agreed in principle.

Second, satellite carriers could readily determine whether their customers are cable subscribers by obtaining privacy waivers from the customers and asking their cable systems whether the customers have recently subscribed. As discussed below, the satellite carriers have (until now) done neither of these things, nor taken any other meaningful steps to comply with the Act.

2. Satellite Carrier Non-compliance With the "Unserved Household" Restriction

In practice, satellite carriers have effectively ignored the restrictions that Section 119 imposes on their retransmission of network programming. In these Comments, we focus on the extraordinary pattern of infringements by PrimeTime 24, which today delivers network programming to more than two million homes

³ The Longley-Rice methodology is explained in a declaration prepared by Jules Cohen, a distinguished broadcast engineer, for use in one of the lawsuits filed against PrimeTime 24. A copy of Mr. Cohen's declaration is attached as Exhibit A.

As Mr. Cohen explains, traditional FCC Grade B contour maps show the predicted propagation of a television station assuming that the terrain near the station is at the national average. In these maps, the predicted Grade A and Grade B contours often appear as circles.

nationwide, and boasts that it is growing at a rate of 30% per year.⁴ (As discussed below, two of the three satellite carriers that carry network stations, Primestar and Netlink, along with two distributors of PrimeTime 24 (EchoStar and Programmers Clearing House), have agreed in principle to a system designed to ensure compliance with the "unserved household" restriction.)

There are two simple ways to demonstrate the breadth of PrimeTime 24's violation of the "unserved household" limitation:

a. Maps showing Grade B propagation and subscriber locations. As discussed above, it is possible to produce sophisticated maps that use detailed terrain data to predict the actual propagation of a television station's signal. In addition, readily available "geocoding" software makes it possible to pinpoint the locations of subscribers on a map. Combining these technologies provides a simple way to evaluate whether a satellite carrier is complying with the "Grade B intensity" standard imposed by Congress.






As the map on the next page demonstrates, PrimeTime 24 completely ignores the Grade B intensity requirement in its actual sales practices. The map shows the predicted propagation of WFOR, the CBS station in Miami, Florida, and the locations of a sample of PrimeTime 24's customers in this area. The map graphically demonstrates PrimeTime 24's routine, and lawless, sale of distant network stations to households in WFOR's core urban and suburban service area that obviously receive signals of Grade B intensity. This pattern of abuse by

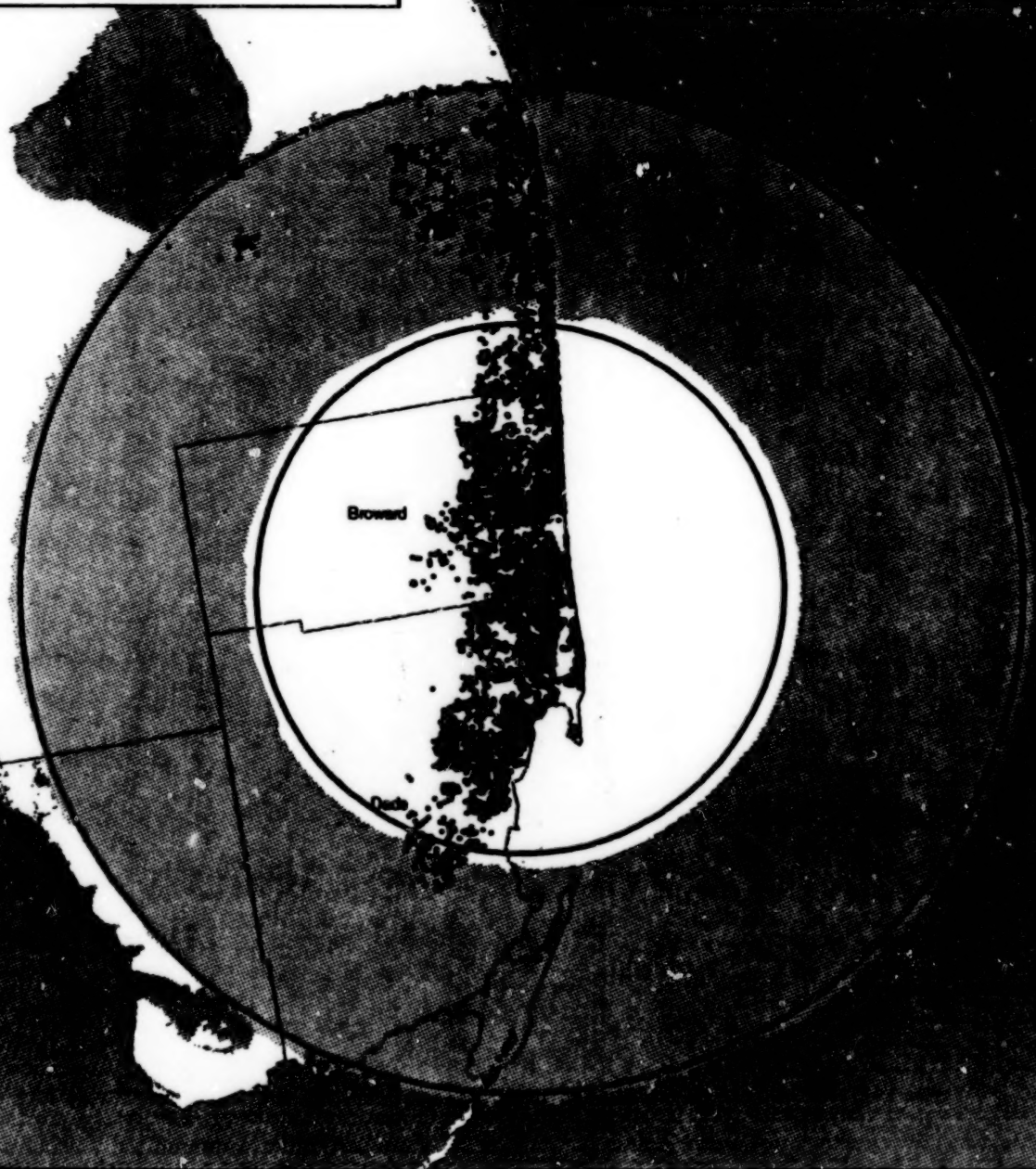
⁴ PrimeTime 24 Web site (www.primetime24.com), April 23, 1997.

WFOR: Miami, FL
A CBS Affiliate

New PrimeTime 24 Subscribers through DirecTV since 1/1/96

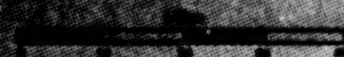
Key

-  "B" Signal Coverage Area
-  "A" Signal Coverage Area
-  County Boundary
-  PrimeTime 24 Customer
-  FCC Predicted Contours



6963 Subscribers in "A" Coverage
8777 Subscribers in "A"&"B" Coverage
8730 Subscribers in FCC A&B Contours
99.98% of Subscribers in FCC A&B Contours
also inside of "A"&"B" Coverage

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Map Systems, Inc. All Rights Reserved



PrimeTime 24 is uniformly replicated in television markets, large and small, across the United States. To illustrate the point, we have attached at Exhibit A, Tabs (B)1-5, similar maps for (a) the top 15 markets in the country, (b) 15 randomly selected markets in the other top 100 markets, (c) 5 randomly selected markets in the remaining markets (## 101-211), and (d) several other markets at issue in current litigation against PrimeTime 24. From Detroit to Denver, from Atlanta to Alpena, these maps show that despite the plain requirements of Section 119, PrimeTime 24 has no geographic restriction whatsoever on where it will sell network programming.

b. Signal intensity testing. Broadcasters have commissioned professional engineers to perform actual signal intensity tests at the homes of hundreds of randomly selected PrimeTime 24 subscribers in two markets in which litigation is pending. The results are overwhelming. First, in the Miami area, broadcasters tested 100 randomly selected PrimeTime 24 subscribers (among those who had signed up in May 1996) for testing. Every one of these 100 locations got at least a Grade B intensity signal of both the CBS and Fox stations in Miami -- in almost all cases, an even stronger, Grade A intensity signal. Cohen Declaration, ¶¶ 14-17 (Exhibit A hereto).

Similarly, in Amarillo, Texas, the local NBC station arranged for two sets of signal intensity tests of randomly selected local PrimeTime 24 subscribers. A professional engineer conducted 273 signal intensity measurements -- of which 262, or 96%, showed that the customer received a signal of at least Grade B

intensity. Again, in almost all cases the household actually received a signal not merely of Grade B intensity but of Grade A intensity. See Expert Report and Supplemental Expert Report of Louis Robert du Treil, Jr. (Dec. 26, 1996 and Feb. 27, 1997), Cannan Communications, Inc. v. PrimeTime 24 Joint Venture, Civ. No. 2-96-CV-086 (N.D. Tex.).

3. How These Massive Violations Happened

How did PrimeTime 24 accumulate so many ineligible customers? The answer is simple: PrimeTime 24 does not, and has never, marketed its network package as an "unserved household" service. To the contrary, PrimeTime buries in fine print the fact that there are any legal restrictions on its service.

Because it knows that the market for "unserved households" is very small, PrimeTime 24 aggressively promotes other benefits of its service to the public and to satellite retailers. The advertisement on the next page illustrates its cynical strategy: PrimeTime 24 asks satellite dealers, "Do Your Customers Know They Can Get The Network on Their DBS System? Do You?" Only by reading tiny print at the bottom could one discover that there is any legal restriction on this service.

PrimeTime 24's motivation for selling to "served" households -- maximizing its (unlawful) profits -- is thus easy to see. From the viewers' perspective, there are a number of reasons -- totally unrelated to living in an "unserved household" -- why viewers pay to receive network programs by satellite:

- No need for antenna. Many satellite carrier customers (particularly

DO YOUR CUSTOMERS KNOW THEY CAN GET THE NETWORKS ON THEIR DBS SYSTEM?



DO YOU?

PRIME TIME 24—THE CONNECTION TO THE NETWORKS

Don't miss out on a big DBS sale because you're unsure about the programming. Network television is a top programming concern with potential DBS dish customers and now you can tell them with confidence that it's available to them if they qualify.* With PrimeTime 24's network affiliates, your DBS customers won't miss one minute of their favorite prime time programs, daytime soaps, evening news and seasonal sports on East and West Coast feeds.

They'll get great regional variety from 6 great network affiliates: KOMO - ABC Seattle, KPAX - CBS San Francisco, KNBC - NBC Los Angeles, WNBC - NBC New York, WJLA - ABC Washington, D.C. and WRAL - CBS Raleigh, plus FOX NFL, the national FOX signal. And they'll enjoy the convenience of both Eastern and Pacific viewing times.

Close more sales—let your customers know about PrimeTime 24. We're America's Network Connection. Coast to Coast.



WRAL
KPAX



WNBC
KNBC



WJLA
KOMO



For more information call
DIRECTV® at 1.800.323.1994
DISH Network® at 1.800.521.9282 or
AlphaStar™ at 1.888.YOURSTAR



Visit PrimeTime 24's website at <http://www.primetime24.com>

"America's Network Connection
COAST TO COAST"

ABC, CBS, NBC and FOX Channels are only available: (1) for private home viewing; (2) to households that cannot receive an acceptable off-air picture with the use of a conventional rooftop antenna; and (3) in households that have not received that network by cable television within the last 90 days.

*PT East and FOX NFL Services only.

Source: All Data courtesy of ABC, NBC, CBS, FOX, and the National Cable Television Association. © 1999 PrimeTime 24, Inc. All rights reserved. PrimeTime 24 is a service mark of PrimeTime 24, Inc. All other marks are the property of their respective owners.

Circle 31 on Info Card

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846

former (or current) cable subscribers) have had their over-the-air antennas removed, or have allowed them to fall into disrepair. (See below.) By signing up for PrimeTime 24, a viewer can receive network programming without the need to install (or maintain) a rooftop antenna -- or even set-top "rabbit ears."

- ▶ Seeing programs earlier or later. PrimeTime 24 offers both East Coast and West Coast ABC, CBS, and NBC stations. Viewers can therefore use time zone differences to watch programming hours earlier (or later) than its local broadcast. For example, a PrimeTime 24 subscriber in Colorado can watch "Seinfeld" at 7:00 p.m. from WNBC in New York, and a PrimeTime 24 subscriber in California can watch David Letterman from WRAL in Raleigh at 8:30 p.m.
- ▶ Access to out-of-town sports events. Network stations often broadcast different sports events in different parts of the country. The National Football League, for example, provides each NFL city with the games in which its own team plays, but does not broadcast many of those games elsewhere. Satellite dish owners can obtain access to many out-of-town NFL games by marketplace means by purchasing the "NFL Sunday Ticket" package. PrimeTime 24 exploits the Section 119 compulsory license to deliver many of these same out-of-market games to its customers without having to negotiate the relevant rights in the marketplace.

- Sale of network stations as part of fixed-price package. As the advertisement on the next page illustrates, PrimeTime 24 and several of its distributors offer network stations as an automatic part of a larger package of channels such as CNN, ESPN, and USA Network. Strikingly, several distributors do not offer any discount if one does not take the network stations as part of the package. Thus, viewers have no economic incentive not to take the distant network package.

If it intended to comply with the Copyright Act, PrimeTime 24 would have implemented objective standards to ensure that only true "unserved households" -- not served homes seeking to subscribe for other reasons -- could sign up for its service. Instead, PrimeTime 24 markets directly to, and welcomes the business of, hundreds of thousands of plainly ineligible customers. Its "compliance" system, which relies entirely on a patently unreliable system of self-reporting, is a sham. Subscribers are well aware that, in order to receive PrimeTime 24's network package, all they need to do is say "no" to PrimeTime 24's "compliance" questions.⁵

⁵ See David Hatch, Coalition Sets Sights on Satellites: Primetime Hit with Suit over Network Signals, Electronic Media, Jan. 2, 1997, at 3 ("Satellite sources point out that some customers who are capable of receiving local signals lie and tell satellite companies they cannot receive them."); Mark Robichaux and Bryan Gruley, Battle in the Air, Wall Street Journal, Jan. 30, 1997 ("At present, DBS customers in the middle of cities and suburbs, who can easily get strong local signals, are fibbing about 'poor' picture quality to satellite-dish services and retailers so they can get out-of-market signals."); Rick Redding, Area TV Stations Challenge Thousands of Satellite Users, Business First Of Louisville, Jan. 27, 1997 ("many viewers apparently can't resist the temptation to tell a white lie or two."); *id.* (quoting satellite dealer as saying "It's up to the customer - he can call and lie through his teeth, that's up to the mentality of the customer"); TV's Changing Picture, Consumer Reports, Dec. 1996, at 14 ("You can order broadcast

PrimeTime 24 has no objective check whatsoever on the answers it receives from customers (in those cases in which it even asks the questions). Far from representing a genuine effort at compliance, PrimeTime 24's system is simply an attempt to create the appearance of a compliance effort while enrolling as many customers as possible to maximize profits.

4. **A "Picture Quality" Standard Would Be Unworkable and Would Gravely Jeopardize the Network/Affiliate System**

As discussed above, Congress consciously and deliberately chose an objective standard for determining which households are eligible -- and which are ineligible -- to receive network programming by satellite. Congress knew that to choose a vague, subjective standard, such as "acceptable picture quality," would turn enforcement of the Act into a morass. Instead, Congress chose a two-part standard, both parts of which are strictly objective: a signal of less than Grade B intensity, and no cable subscription in the previous 90 days.

Neither the "Grade B intensity" standard nor any other objective standard is perfect. But this is a case in which the perfect is the enemy of the good. To be enforceable, a standard for eligibility must be clear and objective. A subjective "picture quality" standard would turn enforcement of the Satellite Home Viewer Act into a nightmare: it would transform every household claiming to receive an "unacceptable" picture over the air into its own federal case. To apply such an

network service on your dish, providing you say you can't receive local channels well with an antenna") (emphasis added).

unwieldy standard, an army of "TV watchers" across all 50 states -- presumably multiple watchers in each case -- would need to be assembled to make subjective determinations about whether the signal available at a given location permits one to receive an "acceptable" picture. To protect against arbitrary decisions, these subjective rulings would presumably need to be reviewed by still another level of subjective decisionmakers.

As discussed in more detail below, there is no possible justification for creating such a hugely burdensome new bureaucracy. And except for PrimeTime 24 -- which seeks to protect its massive profits from selling to all comers -- the broadcast industry and most of the satellite carrier industry have already reached agreement in principle on a set of procedures for implementing the existing legal standard. Under the agreement in principle, the parties will use the terrain-sensitive signal propagation maps discussed above to determine which Zip Codes are likely -- or unlikely -- to receive a signal of Grade B intensity. If a Zip Code is shown on the maps as likely to receive a signal of Grade B intensity, that Zip Code would be classified as a "red light" area into which the carriers would not in the first instance be allowed to sell. In those areas, viewers could ask a station for a waiver (which would be deemed granted if not responded to within a specified period); if the waiver request were denied, the viewer could request his or her satellite carrier to conduct a signal intensity test, under the "loser pays" system endorsed by Congress in the 1994 amendments to Section 119. Similarly, in "green light" (presumptively unserved) areas, a station could decide to perform

testing on a loser-pays basis if it believed that a household did in fact receive a signal of Grade B intensity.

5. The Satellite Industry Is Addressing the Delivery of Local Signals Through Marketplace Means

The real problem lurking behind the controversy about the definition of "unserved household" is that companies selling satellite-to-home services do not properly disclose to customers that local stations are not part of the satellite package. Having failed to make this disclosure, selling a package of out-of-town network stations (such as PrimeTime 24) provide an easy, though unlawful, way to provide popular network programs to satellite dish purchasers.

There is another important real-world backdrop to the "unserved household" controversy: many households do not have functioning rooftop antennas, or even set-top "rabbit ears." As one recent DBS industry publication explains, "the [satellite] customer . . . probably has been a cable TV subscriber for a long time.^[6] And there's a good possibility that the last time they watched TV from an antenna was back when Jimmy Carter was President. Or worse, it was using the rabbit ears that came with the TV set. Needless to say, it's understandable that they'd be skeptical about going back to an old antenna for local channel reception." Bob Shaw, Customers Get Local Channels Free With Every DSS, DSS Insider, Winter 1997 (Exhibit B).

Since many viewers no longer have antennas -- or if they do, the antennas

⁶ Nearly 2/3 of all American television households subscribe to cable.

have long since gone out of working order -- it is not surprising that some viewers complain that they get a "bad picture" over the air. This is not a flaw with the Copyright Act. It is a flaw in the marketing practices of satellite companies, which have not adequately addressed the need to help their customers integrate local broadcast programming with satellite-delivered programming such as ESPN, CNN, or HBO.

The satellite industry is now acknowledging the need to solve this problem, and to do so in lawful ways. And contrary to PrimeTime 24's claims about picture quality, the satellite industry has repeatedly admitted in public statements that obtaining local signals over the air is a simple matter for almost all viewers. The President of DirecTV, Eddy Hartenstein, for example, publicly stated in January 1997 that "all of our subscribers have figured out' how to get local channels." Satellite Sales Buoy Lagging Consumer Electronics Market. Communications Daily, Jan. 10, 1997. And United States Satellite Broadcasting, which shares satellite space with DirecTV, likewise recently assured satellite dealers that "[t]oday's antennas (you probably sell them in your store) are capable of bringing in a high quality signal for just about every urban or suburban homeowner. And it will almost always be a clearer, more stable, and more reliable signal than cable TV!" Bob Shaw, Customers Get Local Channels Free With Every DSS (Exhibit B).

DirecTV is exploring the possibility of providing its customers with both a satellite dish and an over-the-air antenna to make it easy for its customers to enjoy both satellite-delivered channels and local stations. As DirecTV's Mr.

Hartenstein has explained, "We've got to integrate the antenna with the 18-inch satellite dish." Stephen Keating, Antennas the Hot News for Satellite TV Denver Post, March 26, 1997, 1997 WL 6068687. Similarly, EchoStar (which plans to merge with AskyB under the name "Sky") has announced plans to provide viewers in smaller markets with a seamlessly integrated dish/antenna system. Antenna companies themselves are developing new designs to meet the needs of satellite dish owners.⁷ Reflecting these developments, the integration of satellite dishes and over-the-air antennas was a major topic of discussion at the satellite industry convention just a month ago. Stephen Keating, Antennas the Hot News for Satellite TV, *supra*.

Satellite carriers are also exploring other ways to deliver local broadcast stations to viewers. PrimeStar, for example, plans to make it easy for satellite subscribers in appropriate cases to retain lifeline cable subscriptions that provide local broadcast stations. And as the Office is aware, EchoStar/Sky plans to offer local stations to viewers in many markets as part of the satellite package itself.

These marketplace developments -- and not a radical and unworkable change in the Copyright Act -- represent the real solutions to the problem of satellite dish households receiving "acceptable quality" pictures from their local

⁷ See Advertisement, "The DBS Local Station Solution -- The Freedom Antenna from Mito Corporation," Satellite Business News, April 23, 1997; Press Release, Antennas America, Inc. Announces a Breakthrough in Local Channel TV Reception for Direct Broadcast Satellite, Dec. 23, 1996; DBS Popularity Revives Novel Broadcast Antenna Designs, Communications Daily, Feb. 25, 1997, at 5). These materials are collected as Exhibit C hereto.

stations. It would be a serious error to preempt the development of these win/win marketplace solutions by imposing a complex and unmanageable new layer of government regulation.

6. Answers to Specific Copyright Office Questions

In this section, we provide responses to the specific inquiries posed by the Copyright Office in its Notice with regard to the Satellite Home Viewer Act:

Q. Is the white area restriction of the satellite license still necessary, or should satellite carriers be permitted to provide network signals to all their subscribers?

Answer: For the reasons discussed above, the white area restriction continues to be absolutely necessary. Eliminating that restriction would have devastating effects on the viability of the over-the-air network/affiliate system. The Satellite Broadcasting and Communications Association has recently described DBS as the fastest growing consumer electronics startup ever, outstripping the growth pace of such now ubiquitous technologies as color TVs and VCRs. Given this extraordinary growth, the destructive impact of delivery of distant network stations -- if not checked by an effective "white area" restriction -- would be enormous.

Q. Is it now possible, and appropriate, to impose exclusivity protection upon satellite carriers through FCC regulation (syndicated exclusivity and network non-duplication) rather than through the copyright statute?

Answer: NAB believes that it is now possible to impose syndicated exclusivity requirements on satellite carriers, that the FCC should be directed to

develop such rules, and that the compulsory license should be contingent on satellite carrier compliance with them. The Satellite Home Viewer Act of 1988 required the FCC to commence a proceeding to impose syndicated exclusivity rules on satellite carriers if the FCC determined that they were feasible. See 47 U.S.C. § 612. When the issue was considered by the FCC, however, the information necessary to assess the satellite carriers' claims that it was technically impossible to provide syndex protection was unavailable. It now appears that developments in set-top box technology, by themselves or in combination with systems for signal compression and spot beam use, allow market-specific addressability, and have made such a system feasible. Given that the technology and business of the satellite industry have thus changed over the nearly ten years since the enactment of the compulsory license, syndicated exclusivity protection should now be imposed in order to protect important federal policies in favor of localism and exclusive license rights.

Q. If the white area restriction remains, is the grade B signal intensity still an appropriate measure? Should another standard be adopted, such as picture quality?

Answer: For the reasons discussed in detail above, Grade B signal intensity is the appropriate measure. Any subjective standard (such as "acceptable picture quality") would make the white area restriction impossibly cumbersome and unenforceable.

Q. If picture quality is appropriate, how can that be enforced as a legal

standard for determining copyright infringement?

Answer: "Picture quality" is an inappropriate standard because it cannot possibly be enforced as a practical matter. Indeed, the picture quality standard is plainly intended by its advocate, PrimeTime 24, to make enforcement impossible and to permit it to continue to sell network programming to anyone who asks for it.

Q. How can subscribers who cannot have a conventional rooftop antenna receive network signals from their satellite carrier?

Answer: We respectfully suggest that the premise of this question is mistaken: that certain subscribers are able to use a satellite dish, but not an over-the-air outdoor antenna. As a physical matter, if the subscriber is able to have a satellite dish installed, he or she should also be able to have an over-the-air antenna installed as well. (The expected development of combined dish/antenna devices should make this even easier in the future.) As a legal matter, the FCC has already preempted most local restrictions on both satellite dishes and rooftop antennas, 47 C.F.R. 1.4000, and is currently considering even broader pre-emption. It would be unprincipled and wrong to permit cities (or building owners) to destroy the rights granted to broadcasters under the Copyright Act by establishing rules favoring satellite dishes over broadcast antennas.

Q. What is the justification for the 90 day waiting period from any subscription to a cable system that provides the signal of a primary network station affiliated with that network, and should that provision be eliminated from the statute?

Answer: The justification is that cable systems deliver local -- not distant -- network stations, and that the Copyright Act should not encourage viewers to lightly switch from one to the other. The restriction should not be eliminated. Indeed, the waiting period should be expanded to apply to the reception of local network stations by any means.

Q. A possible solution to difficulties surrounding the white area provision is an adjustment in royalty rates designed to compensate local network affiliate broadcasters for the loss of viewership to distant network signals. In essence, subscribers who reside within the service area of a network affiliate, and desire to receive the signal of a distant network affiliate, can pay a surcharge for the privilege of receiving that distant network affiliate. The monies generated by the surcharge would be paid to the network affiliates. Is this a viable option and, if so, how should the surcharge monies be collected and who should administer their payment?

Answer: This is a subject for each broadcaster to address individually.

However, there appear to be two obvious, and fundamental, problems with this proposal. First, it would change a local broadcaster from a business providing valuable services to its local community to a mere middleman whose only function is as a "rent collector." For local viewers who had been "given away" to distant stations, the local broadcaster would not be adding any economic value to either its network or to advertisers. A broadcaster who is not adding value cannot expect to long stay in business.

Second, since networks own the copyright (or exclusive rights) in much of the programming they provide to their affiliates, it is not clear that, even if an affiliate station wanted to do so, it could license a carrier to deliver network programming by satellite within the station's local market.

As the Office may be aware, PrimeTime 24 has already proposed this approach to many network affiliates. See Media Daily, PrimeTime 24 Offering to Pay Local Affiliates, Feb. 25, 1997 ("Amira said . . . [PrimeTime 24] customers might pay an extra \$1 to \$2 per channel" to receive distant network stations). The Office may wish to ask PrimeTime 24 about the responses that it received in its marketplace test of this proposal. If this "solution" has been rejected in the marketplace, Congress should obviously not impose it on a compulsory basis.

Q. Finally, with respect to satellite subscribers who have their service of network signals disconnected due to the white area restriction, what means of redress can they be afforded to determine that termination of their service was accurate and required? Can the subscriber require that either the satellite carrier terminating service, or the network affiliate challenging service, conduct a test at his/her household to determine if he/she is eligible for network service? Who should pay for such test and how should it be administered? What should be the appropriate standards of the test?

Answer: The "loser pays" principle of the 1994 amendments -- which would be incorporated as part of the proposed settlement agreement -- provides incentives to ensure that both stations and satellite carriers are reasonable in staking out positions about which homes receive a signal of Grade B intensity. Under the proposed settlement agreement, satellite carriers would have the option to conduct tests at their subscribers' homes if they so choose. The carriers could pay for these tests themselves, or could ask their customers to do so. If a lawsuit is pending, the "loser pays" principle of Section 119(a)(9) will apply to tests done by either a carrier or by a station. The standards for conducting a signal intensity test should either follow those set forth by the FCC in its regulations (and used in

the Miami and Amarillo tests discussed above), or the modified version agreed to in the tentative settlement.

Under the proposed settlement, satellite carriers would no longer be signing up customers in plainly served areas. This would free up the time and attention of both stations and satellite carriers to deal with any difficult cases that may arise at the margins. At present, such cases may get lost amidst the tens (or hundreds) of thousands of plainly ineligible subscribers.

It would be totally inappropriate to require a network station to pay, in the first instance, for signal intensity tests that it does not choose to conduct. With such a rule, broadcasters could be forced to conduct millions of individual tests at their own expense; when the tests show (as is true in almost all cases) that the home does receive a signal of Grade B intensity, the broadcasters would face the impossible task of trying to collect the costs from millions of individual homeowners. In other words, such a rule could encourage an extraordinarily unfair form of economic warfare against local stations.

Q. If a test is created, should subscribers who currently receive network signals be grandfathered in their receipt of those signals?

Answer: Clearly not. Congress decided to grandfather existing subscribers in 1988, since the law until then had not been clear about which (if any) dish owners were entitled to receive network stations by satellite. Since 1988, the law on the matter has been very clear, and there is no excuse for satellite carriers' having sold network programming to ineligible subscribers since then. To

grandfather existing unlawful subscribers would reward egregious wrongdoing by the satellite carriers, and would create a two-tier system in which certain viewers would enjoy unlawful privileges (such as network program time-shifting) that the law properly denies to others. The proper way to handle existing unlawful subscribers is an appropriately timed transition period to give viewers ample time to make arrangements to obtain their local network stations.

Q. Should the matter of a subscriber's eligibility to receive network service from a satellite carrier be a matter of private determination between broadcasters and satellite carriers, or should a government agency make the determination?

Answer: The proposed settlement agreement would rely on the government-set standard for eligibility, but on a privately-crafted enforcement regime to ensure that the standard is actually followed. There is no need for any change in the standard for eligibility contained in Section 119 -- which, by the way, was approved and endorsed both in 1988 and in 1994 by the satellite industry.

Q. Another area of recent interest is the enforcement of the white area restriction. If such a restriction continues, how can it be more economically and efficiently enforced? Are there better ways to identify which subscribers may receive network signals under the satellite license, and those who are not eligible?

Answer: Broadcasters have been working with the cooperative satellite carriers to address these precise questions. The tentative settlement agreement accomplishes these goals.

Q. Should the remedies for copyright infringement be amended to provide for additional and/or different remedies for violations of the white area

restriction?

Answer: Should the Act be extended, the penalties for white area violations should be greatly increased. At present, the caps on statutory damages (e.g., \$250,000 per 6-month period for a national violation) are much too low.

Q. The satellite carrier license will expire at the end of 1999. Should the license be extended on a permanent basis, or is temporary extension still an appropriate solution? If an extension is temporary, what mechanisms can be put into place to encourage a smooth and efficient transition into a free marketplace system? Is collective administration of copyrighted broadcast programming an appropriate solution, and, if so, who should administer such a system?

Answer: Congress should not extend the Satellite Home Viewer Act until the satellite industry is in full compliance with the "unserved household" limitation. As discussed above, satellite carriers have egregiously violated the existing law, and should not be entitled to enjoy the special privilege of a compulsory license when they violate its fundamental terms. If that problem has been resolved satisfactorily by 1999, Congress should then evaluate whether marketplace options -- which are always the preferred solution under the Copyright Act -- are available to replace the compulsory license.

Collective administration is not an appropriate option. There is no reason to move to a complicated new government-imposed administrative regime when marketplace solutions are available.

Finally, any extension of the satellite compulsory license should be for no more than five years, to permit Congress and the affected parties to consider technological and marketplace changes that have occurred in the meantime.

Respectfully submitted,

Benjamin F. P. Ivins /qs

Henry L. Baumann
Benjamin F. P. Ivins

**NATIONAL ASSOCIATION OF
BROADCASTERS**

1771 N Street, N.W.
Washington, D.C. 20036

April 28, 1997

Before the
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Washington, D.C. 20540

In the Matter of)
)
)

Revision of the Cable and)
Satellite Compulsory)
Licenses; Public Meetings)
)

**EXHIBITS TO COMMENTS OF
NATIONAL ASSOCIATION OF BROADCASTERS**

Exhibit

- A Declaration of Jules Cohen
- B Bob Shaw, Customers Get Local Channels Free With
Every DSS, DSS Insider, Winter 1997
- C Materials re use of antennas with satellite dishes

Henry L. Baumann
Benjamin F.P. Ivins

**NATIONAL ASSOCIATION OF
BROADCASTERS**

1771 N Street, N.W.
Washington, D.C. 20036

April 28, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CBS Inc., et al.,)	
)	
Plaintiffs,)	
)	
v.)	CIV-Nesbitt No. 96-3650
)	Magistrate Judge Johnson
PrimeTime 24 Joint Venture,)	
)	
Defendant.)	
<hr/>		

DECLARATION OF JULES COHEN

1. My name is Jules Cohen. I have been a professional engineer with particular emphasis on the fields of broadcasting and signal propagation since the end of 1945 upon my release from active duty as a commissioned officer in the U.S. Navy. I was awarded the degree of Bachelor of Science in Electrical Engineering by the University of Washington (Seattle) in 1938. My initial employment in the field of broadcasting was as a Senior Engineer in the consulting firm of Weldon and Carr. Since 1952, I have been either a sole practitioner, partner or officer of a firm in consulting practice. Clients served have included, among numerous others, five television broadcast networks (ABC, NBC, CBS, PBS and Fox), group owners of radio and television stations, the Association for Maximum Service Television, Inc., the National Association of Broadcasters (NAB), and the Electronic

Industries Association. My testimony as a qualified professional engineer has been accepted by Federal and State courts, the Federal Communications Commission (FCC), and various local boards. I hold professional engineer licenses issued by the District of Columbia, the location of my office, and by the Commonwealth of Virginia, the place of my residence. I am a Life Fellow in both the Institute of Electrical and Electronics Engineers and the Society of Motion Picture and Television Engineers. I am a member of the National Society of Professional Engineers and the American Association for the Advancement of Science. I was elected to membership in Tau Beta Pi, the engineering scholastic honorary. I received the 1988 Engineering Achievement Award of the NAB and the 1992 Engineering Achievement Award of the Broadcast Pioneers Washington Chapter.

2. I have been asked by counsel for the plaintiffs in the above-captioned action to supervise two efforts -- creation of maps and actual signal intensity testing -- designed to assess whether, and to what extent, PrimeTime 24 is violating the requirements of the Satellite Home Viewer Act ("SHVA" or "the Act"). My understanding is that the Act authorizes satellite carriers, such as PrimeTime 24, to deliver distant network stations (including CBS and Fox stations) to satellite dish owners, but only to "unserved households" for private home viewing.

Background

3. The definition of "unserved household" in the SHVA includes, among other things, the requirement that the household "cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of Grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with that network." 17 U.S.C. § 119 (d) (10)(A). Long ago, the FCC defined the term Grade B field strength (intensity) in its regulations: the term is defined as the number of decibels (dB) above a field intensity of one microvolt per meter. The unit is expressed by the FCC as "dBu." (The "u", is actually the Greek letter " μ ," but, for simplicity it is usually written and pronounced as a "u.")

4. Television stations use towers -- often very tall towers, or shorter towers placed at high locations such as mountaintops -- to broadcast their signals over the air to viewers. For example, the CBS station in Miami, WFOR-TV, and the Fox station in Miami, WSVN, operate from towers approximately 1,000 feet in height from an "antenna farm" in North Dade County, Florida.

5. The FCC defines three levels of intensity of over-the-air signals, "City Grade," "Grade A" and "Grade B." The FCC's definition of Grade B intensity -- which the SHVA incorporates by reference -- is a median signal strength level of 47 dBu (224 microvolts per meter) for television channels 2-6 (low VHF), 56 dBu (631 microvolts per

meter) for channels 7-13 (high VHF), and 64 dBu (1,585 microvolts per meter) for channels 14-69 (UHF). 47 C.F.R. § 73.683(a).

6. The decibel is a unit of measurement originally applied to the intensity of sound. Unlike a more familiar ("linear") measuring scale such as temperature in degrees Fahrenheit, dBu's are a highly compressed, "logarithmic" scale. For example, an increase in field intensity from 60 to 80 dBu is a tenfold increase in intensity. A dBu reading of 100 reflects an intensity 100 times stronger than a dBu reading of 60.

Maps of Predicted Signal Intensity

7. The traditional method of predicting a station's signal intensity is to use maps showing contours representing the outer boundaries of grades of service. The prediction method, as specified by the FCC, places particular emphasis on the terrain between two and ten miles from the transmitter, and assumes the national average terrain roughness beyond that distance. Each station is required to file a map, or maps, with the FCC showing its predicted service grades. In the case of some stations, such as WFOR-TV in Miami, these contours appear as concentric circles.

8. In reality, of course, the terrain surrounding any given station's transmitter is unlikely to be at the national "average." For that reason, engineers and scientists have developed signal propagation models that take into account the actual terrain surrounding any given television transmitter. The most widely-used propagation model is referred to as the "Longley-Rice" model. The Longley-Rice model, now in the form of a computer

program, had its origins in Technical Note 101, a publication of the National Bureau of Standards (now the National Institute of Standards and Technology). Technical Note 101 was issued in 1965 and is entitled "Transmission Loss Predictions for Tropospheric Communications Circuits." Its authors were: P.L. Rice, A.G. Longley, K.A. Norton, and A.P. Borsis. The model has been refined over the years by U.S. Government scientists to take into account the availability of improved terrain data bases and the increased sophistication of desktop computers. The model analyzes the terrain point-by-point along radial paths from the transmitter (usually at one-degree azimuth intervals), determines the nature of the obstructions, and provides a map output with indications of where particular field intensities are exceeded. Alternatively, the area of interest is divided into a large number of cells and, based on the terrain from the transmitter to each cell, the program determines whether the specified field intensity or greater is found in that cell. The field intensity loss in strength at increasing distances from the transmitter is a function of whether the path is unobstructed, is generally irregular, is marked by a single prominent obstruction that may be either "knife edged" or rounded, or by multiple prominent obstructions substantially higher than the intervening terrain. Calculations take into effect the particular frequency transmitted since the effect of a particular obstruction is frequency dependent. The model also takes into account atmospheric refractivity near the surface of the earth.

9. The Institute for Telecommunications Sciences (ITS), located in Boulder, Colorado, is the chief research and engineering arm of the National Telecommunications and Information Administration (NTIA), U.S. Department of Commerce. Upon request, ITS has

been providing field intensity maps, based on the Longley-Rice propagation model, for specific areas and television stations since early in the 1980s.

**Creation of Maps Showing Station Signal Levels
and Locations of PrimeTime 24 Subscribers**

10. To illustrate PrimeTime 24's service patterns on a national basis, maps have been generated for forty-three stations around the country. A tabulation of the stations mapped is included in Exhibit A. Copies of the maps are included as Exhibit B. The maps generated are for (1) CBS or Fox stations in each of the top 15 Defined Market Areas (DMAs), (2) Fifteen randomly selected stations in DMAs 17-100 (note -- Miami is DMA 16), (3) Five randomly selected stations in DMAs 101-211, (4) Three additional CBS or Fox affiliates in southern Florida, and (5) Five stations that are named plaintiffs in this case. Where applicable, service provided by translators, which extend a station's coverage, is included together with the service provided by the "mother" station.

11. For each station mapped, the maps show three things: (a) the station's traditional FCC contours (both A and B); (b) the results of a Longley-Rice analysis of the station's predicted signal intensity; and (c) the locations of new PrimeTime 24 subscribers since January 1, 1996 (those signed up through DirectTV).¹⁷ Subscriber locations by

¹⁷ For the majority of maps shown, the map projection used is one that assumes equal distances for one degree of either latitude or longitude. Since at high or low latitudes that projection appears to make a circular plot elliptical, an Albers Equal Area Projection was used for stations in Florida and North Dakota. The use of a particular projection does not affect the relationship of the locations of subscribers to the level of service because identical projection assumptions were made for plotting both.

geographic coordinates were first obtained for as many subscribers as possible. To insure maximum accuracy, this "geocoding" process was done only for subscribers whose addresses could be identified with a high level of precision. (For example, pinpointing the location of a subscriber is not possible when provided only a Post Office box as an address.) Then, with the aid of a computer program, those coordinates were employed to plot the subscriber locations on the maps. Comparison of the plotted subscriber locations, together with the depiction of those areas with signal intensity in excess of Grade B, provides a ready source for predicting the locations of households ineligible for delivery of network stations by direct broadcasting from satellite.

12. The maps are designed to show the locations of PrimeTime 24 subscribers who are either (a) within the predicted FCC Grade A or Grade B contours of the station being mapped, or (b) within the predicted Longley-Rice Grade A or Grade B signal intensity area for the station.

13. Review of the maps shows that large numbers of new PrimeTime 24 subscribers are located in areas where the relevant CBS or Fox station has predicted field intensity, using a Longley-Rice analysis, in excess of Grade B. Indeed, as these maps show, PrimeTime 24 has large numbers of customers within the predicted Grade A contours of every station mapped.^{2/}

^{2/} These maps show only one station at a time. As a result, in a few instances there appear to be clusters of subscribers at the outer edge of a station's coverage area. In fact, these are subscribers in nearby cities -- whose television stations' coverage areas are not shown on the map. For example, in the map of the Toledo CBS station, WTOL, there is a

Testing of Randomly Selected Subscribers in Dade and Broward Counties

14. To determine actual field intensities at PrimeTime 24 subscriber household locations in Dade and Broward Counties, I arranged for counsel to retain the consulting engineering firm of Moffett, Larson & Johnson (MLJ) to make measurements following a prescribed procedure. MLJ is a firm respected by professional engineers and the broadcasting community for its long history of competent engineering performance. I have known for perhaps two decades or more the engineer who actually conducted the measurements under my direction.

15. Measurements were made at 100 locations randomly selected from new May, 1996, PrimeTime 24 subscribers in Dade and Broward Counties who received a distant CBS station. From a listing of 800 subscribers, every eighth entry was selected for the 100-location sample. At each of the 100 locations, measurements were made of the signal intensity of WFOR-TV, the CBS-owned station operating on Channel 4, and WSVN(TV), the Fox network affiliated station operating on Channel 7. In both cases, the community of license is Miami.

16. The measurement procedure followed was based on that prescribed by the FCC in 47 C.F.R. § 73.686. At the accessible road closest to the household, a mobile run

concentration of subscribers to the north of Toledo; these subscribers live in the Detroit area, which, of course, has its own local station. Similar clusters appear on the maps for Milwaukee (reflecting subscribers in the Chicago area); for Winston-Salem, North Carolina (reflecting subscribers in the Raleigh-Durham and Charlotte areas); for Cedar Rapids, Iowa (reflecting subscribers in the Dubuque area); for Colorado Springs (reflecting subscribers in the Denver area); and for Columbus, Georgia (reflecting subscribers in the Atlanta area).

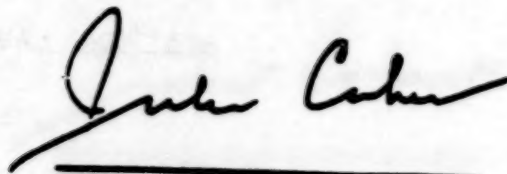
for a distance of 100 feet was made with a conventional rooftop antenna elevated to 30 feet, while recording the station's field intensity and storing the data in a computer. Analysis of the data, made with the aid of a computer program, permitted the extraction of the maximum, minimum, and median field intensity found, together with the standard deviation.¹

17. Results of the measurement program are provided in accompanying tabulations (Exhibits C and D). Maximum, minimum and median field intensities are provided for each location. Also shown are the standard deviations and the median field intensity minus the standard deviation. Median field intensity minus standard deviation is a measure of the least signal intensity likely to be found at the specific location of the household. At each of the 100 locations, measurements were made of the field intensity of both WFOR-TV and WSVN. All 200 measurements showed median field intensity minus one standard deviation to be greater than Grade B. The excess of the median minus one standard deviation over Grade B ranged from a minimum of 2.3 times to a maximum of 1,580 times. On average, these households received a signal 74 times stronger than the Grade B minimum for WFOR-TV, and 69 times stronger than the Grade B minimum for WSVN. Of the 100 locations tested, 95 received a signal of at least Grade A intensity from WFOR-TV, and 99 received a signal of at least Grade A intensity from WSVN.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

¹ Standard deviation is a statistical concept providing a measure of the variability of the data. In mathematical terms, it is the square root of the arithmetic average of the squares of the deviation from the mean (average) of the data collected.

Executed on March 8, 1997.

A handwritten signature in cursive script, reading "Jules Cohen". The signature is written in dark ink and is positioned above a horizontal line.

Jules Cohen, P.E.

STATIONS MAPPER

CBS or FOX STATIONS IN TOP 15 MARKETS

1. WCBS, Channel 2, New York, NY (CBS)
2. KTTV, Channel 11, Los Angeles (Fox)
3. WBBM, Channel 2, Chicago (CBS)
4. WTXF, Channel 29, Philadelphia (Fox)
5. KTVU, Channel 2, San Francisco-Oakland, CA (Fox)
6. WBZ, Channel 4, Boston, MA (CBS)
7. WTTG, Channel 5, Washington, D.C. (Fox)
8. KTVT, Channel 11, Dallas-Fort Worth (CBS)
9. WJBK, Channel 2, Detroit, MI (Fox)
10. WGNX, Channel 46, Atlanta, GA (CBS)
11. KRIV, Channel 26, Houston, TX (Fox)
12. KSTW, Channel 11, Seattle, WA (CBS)
13. WJW, Channel 8, Cleveland, OH (Fox)
14. WCCO, Channel 4, Minneapolis-St. Paul (CBS)
15. WTVT, Channel 13, St. Petersburg-Tampa (Fox)

15 RANDOMLY CHOSEN STATIONS IN MARKETS 17-100

1. KTVI, Channel 2, St. Louis, MO (Fox)
2. KPMB, Channel 8, San Diego, CA (CBS)
3. WITI, Channel 6, Milwaukee, WI (Fox)
4. KUTV, Channel 2, Salt Lake City (CBS)
5. WVUE, Channel 8, New Orleans, LA (Fox)
6. WPMY, Channel 2, Greensboro-Winston-Salem (CBS)
7. WBRC, Channel 6, Birmingham, AL (Fox)
8. WOWK, Channel 13, Charleston-Huntington, WV (CBS)
9. WALA, Channel 10, Mobile-Pensacola, AL (Fox)
10. WTOL, Channel 11, Toledo, OH (CBS)
11. WDKY, Channel 56, Lexington, KY (Fox)
12. KOLR, Channel 10, Springfield, MO (CBS)
13. WZDX, Channel 54, Huntsville, AL - Decatur, FL (Fox)
14. KGAN, Channel 2, Cedar Rapids-Waterloo (CBS)
15. KKTU, Channel 11, Colorado Springs-Pueblo, CO (CBS)

5 RANDOMLY CHOSEN STATIONS IN MARKETS 101-211

1. WFXG, Channel 54, Augusta, GA (Fox)
2. WRBL, Channel 3, Columbus, GA (CBS)
3. KXMC, Channel 13, Minot-Bismarck, ND (CBS)
4. KIDY, Channel 6, San Angelo, TX (Fox)
5. WBKB, Channel 11, Alpena, MI (CBS)

ADDITIONAL STATIONS

1. WSVN, Channel 7, Miami, FL (Fox)
2. WPEC, Channel 12, West Palm Beach, FL (CBS)
3. WFLX, Channel 29, West Palm Beach, FL (Fox)

NAMED PLAINTIFF STATIONS

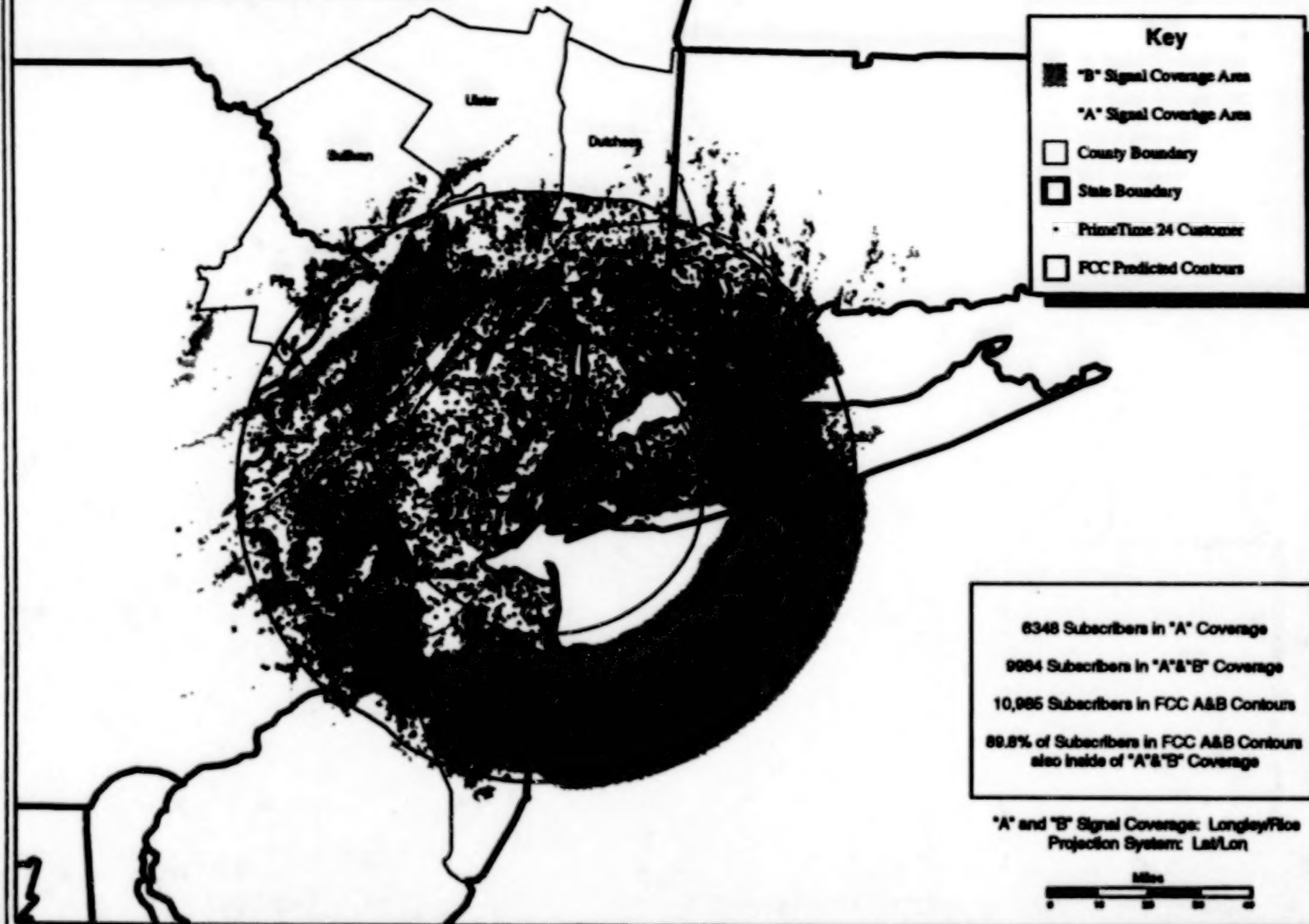
1. WJXT, Channel 4, Jacksonville, FL (CBS)
2. WFOR, Channel 4, Miami, FL (CBS)
3. KJEO, Channel 47, Fresno, CA (CBS)
4. KPAX, Channel 8, Missoula, MT (CBS)
5. WISH, Channel 8, Indianapolis, IN (CBS)

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PAGE

WCBS: New York, NY
A CBS Affiliate

New PrimeTime 24 Subscribers through DirecTV since 1/1/96



877

877


KTTV: Los Angeles, CA
A FOX Affiliate

New PrimeTime 24 Subscribers through DirecTV since 1/1/96

Key


"B" Signal Coverage Area

***A* Signal Coverage Area**

 **County Boundary** State Boundary

- **PrimeTime 24 Customer**

 POC Predicted Contours

10,000 Subscribers in "A" Coverage

13,538 Subscribers in "A" & "B" Coverage

16,013 Subscribers in FCC A&B Contours

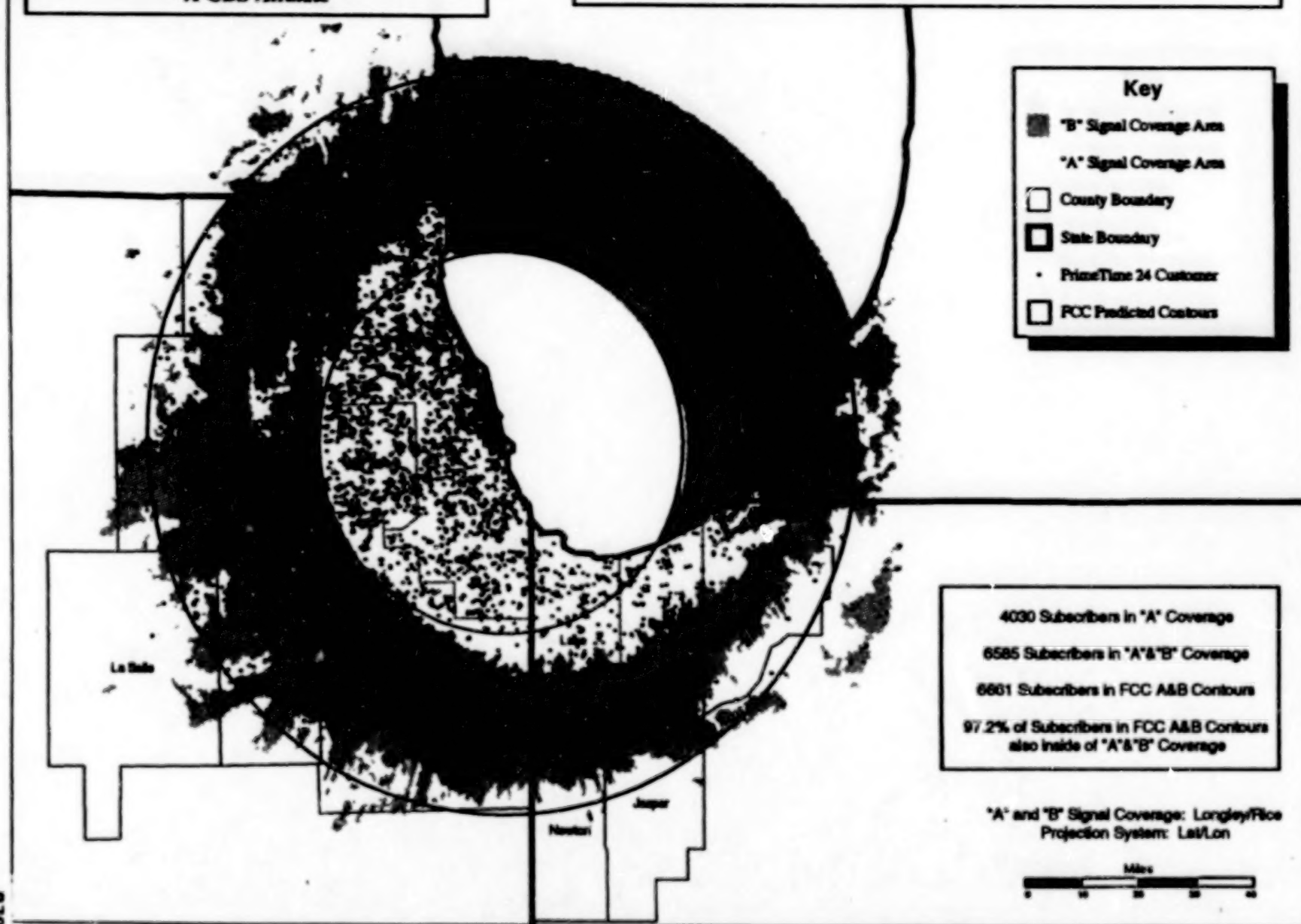
**81.8% of Subscribers in FCC A&B Contours
also inside of "A" & "B" Coverage**

"A" and "B" Signal Coverage: Longley/Fice
Projection System: Lat/Lon

WBBM: Chicago, IL

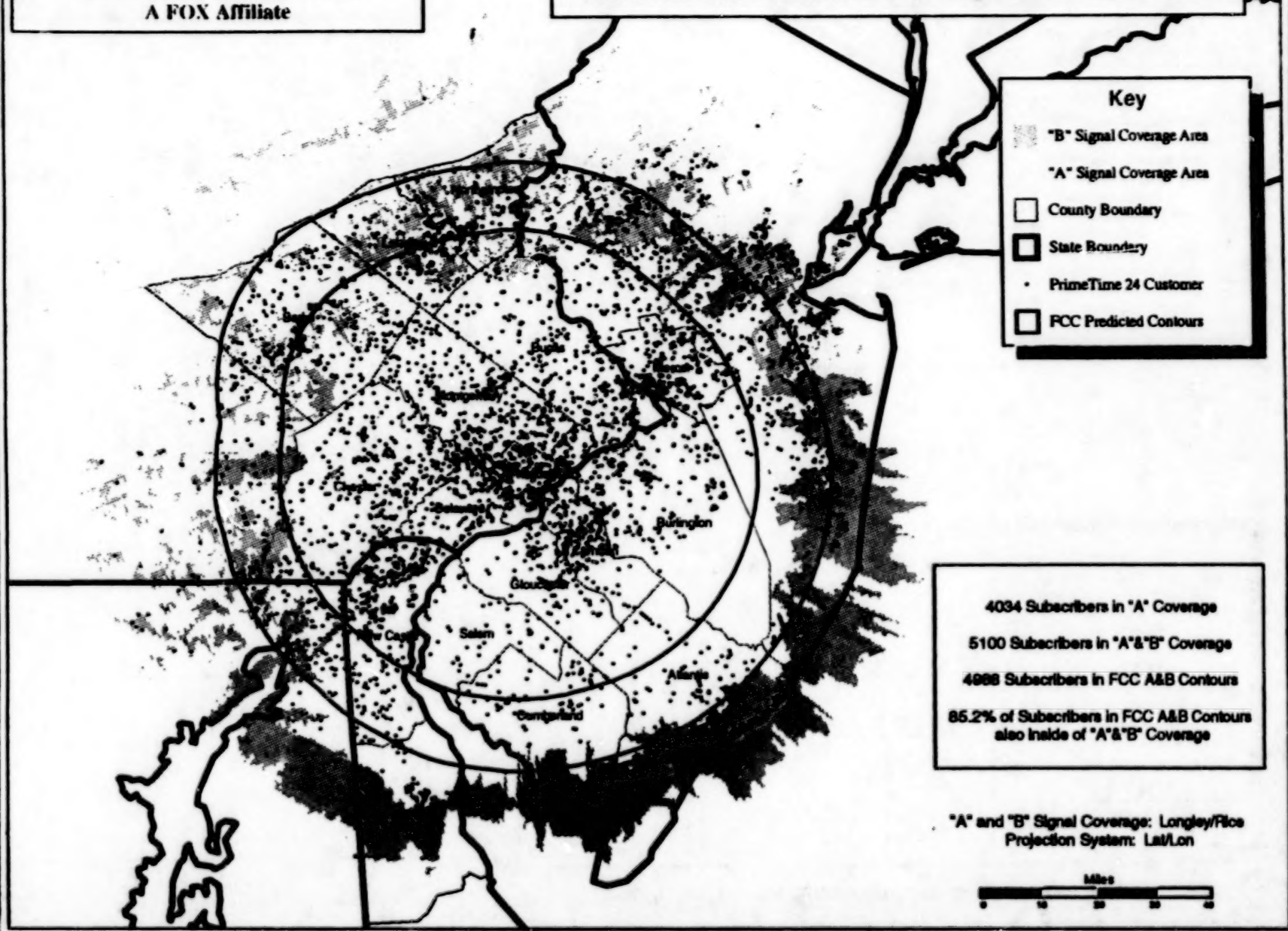
A CBS Affiliate

New PrimeTime 24 Subscribers through DirecTV since 1/1/96



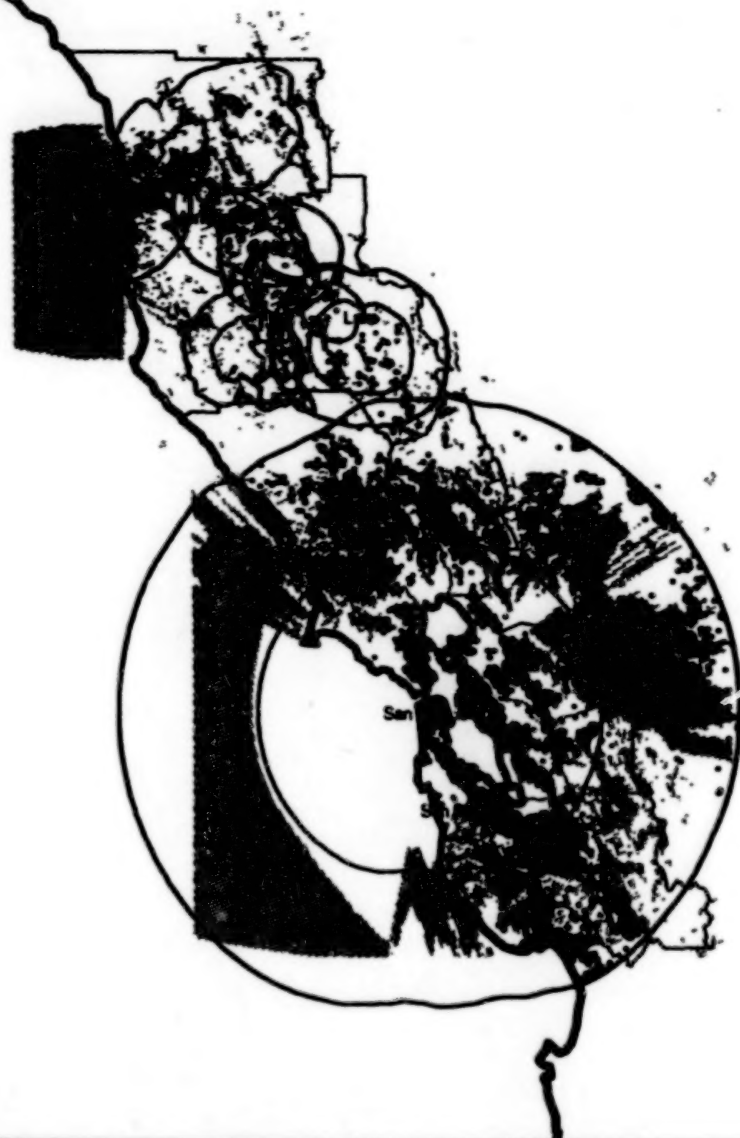
WTXF: Philadelphia, PA
A FOX Affiliate

New PrimeTime 24 Subscribers through DirecTV since 1/1/96









KTVU: San Francisco, CA
A FOX Affiliate

New PrimeTime 24 Subscribers through DirecTV since 1/1/96



Key

-  "B" Signal Coverage Area
-  "A" Signal Coverage Area
-  County Boundary
-  State Boundary
-  PrimeTime 24 Customer
-  FCC Predicted Contours

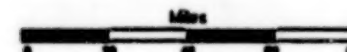
5795 Subscribers in "A" Coverage

8002 Subscribers in "A" & "B" Coverage

10,231 Subscribers in FCC A&B Contours

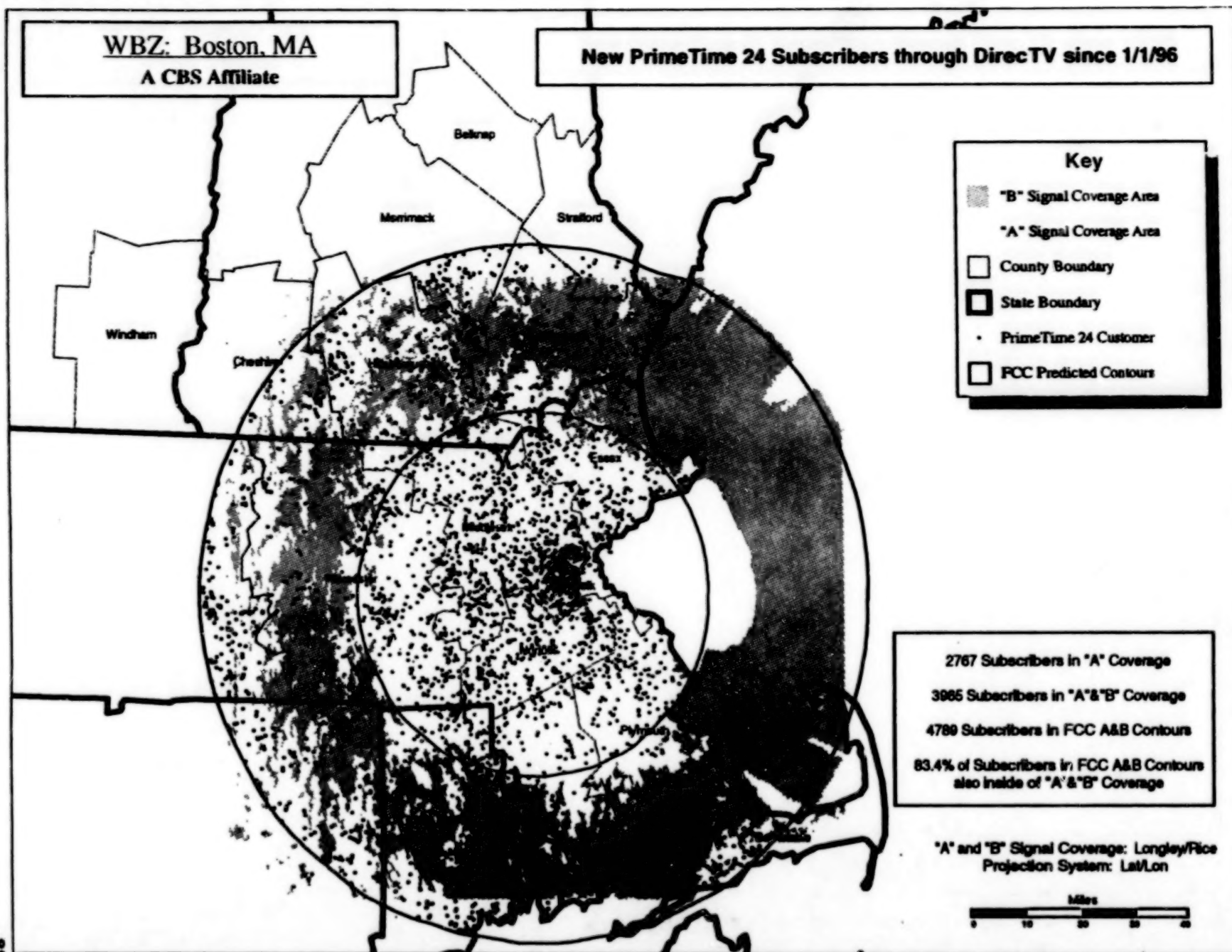
78.0% of Subscribers in FCC A&B Contours
also inside of "A" & "B" Coverage

"A" and "B" Signal Coverage: Longley/Rice
Projection System: Lat/Lon



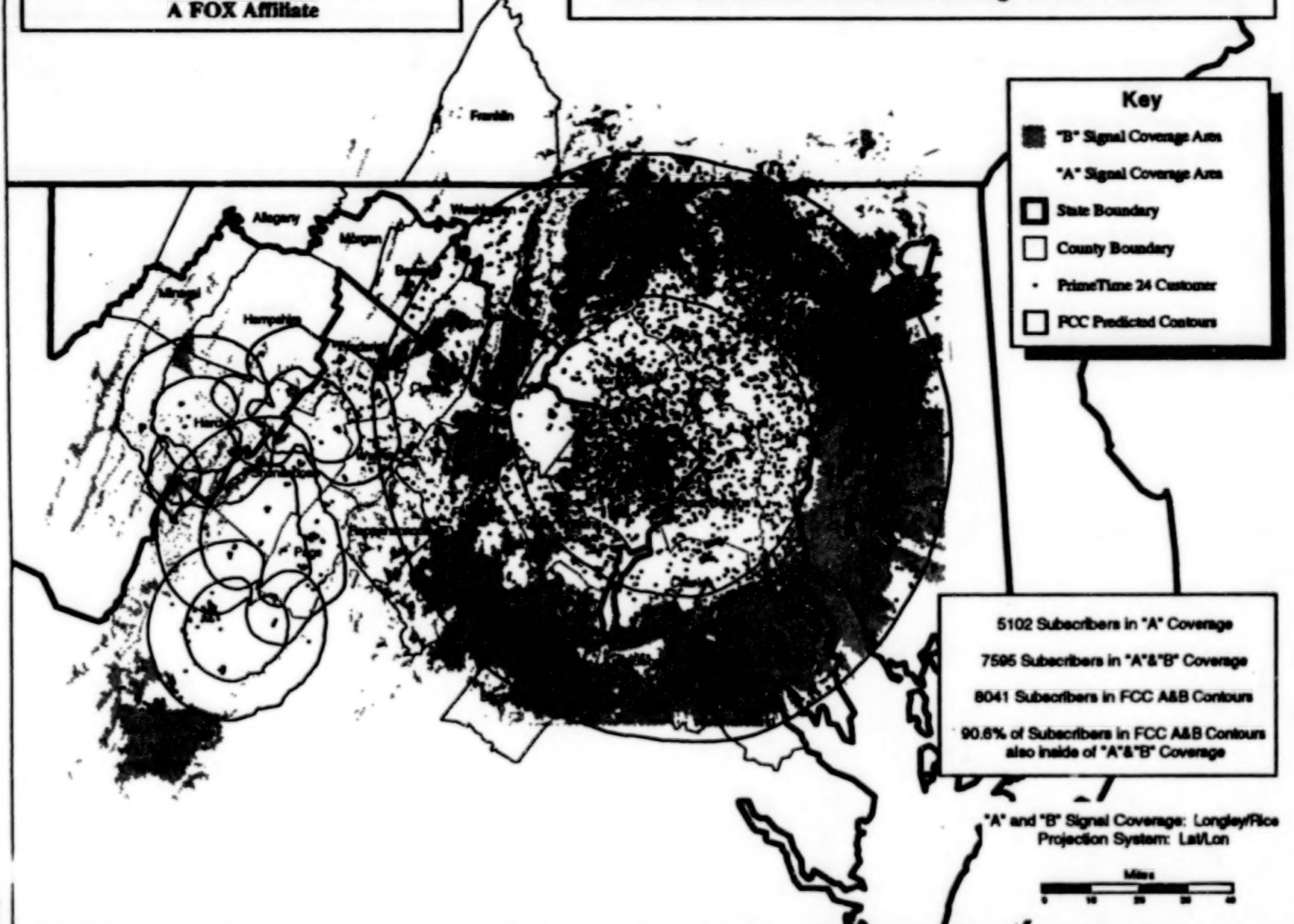
WBZ: Boston, MA
A CBS Affiliate

New PrimeTime 24 Subscribers through DirecTV since 1/1/96



WTTG: Washington, DC
A FOX Affiliate

New PrimeTime 24 Subscribers through DirecTV since 1/1/96



Key

- "B" Signal Coverage Area
- "A" Signal Coverage Area
- State Boundary
- County Boundary
- PrimeTime 24 Customer
- FCC Predicted Contours

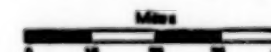
5102 Subscribers in "A" Coverage

7595 Subscribers in "A" & "B" Coverage

8041 Subscribers in FCC A&B Contours

90.6% of Subscribers in FCC A&B Contours
also inside of "A" & "B" Coverage







"A" and "B" Signal Coverage: Longley/Rice
Projection System: Lat/Lon

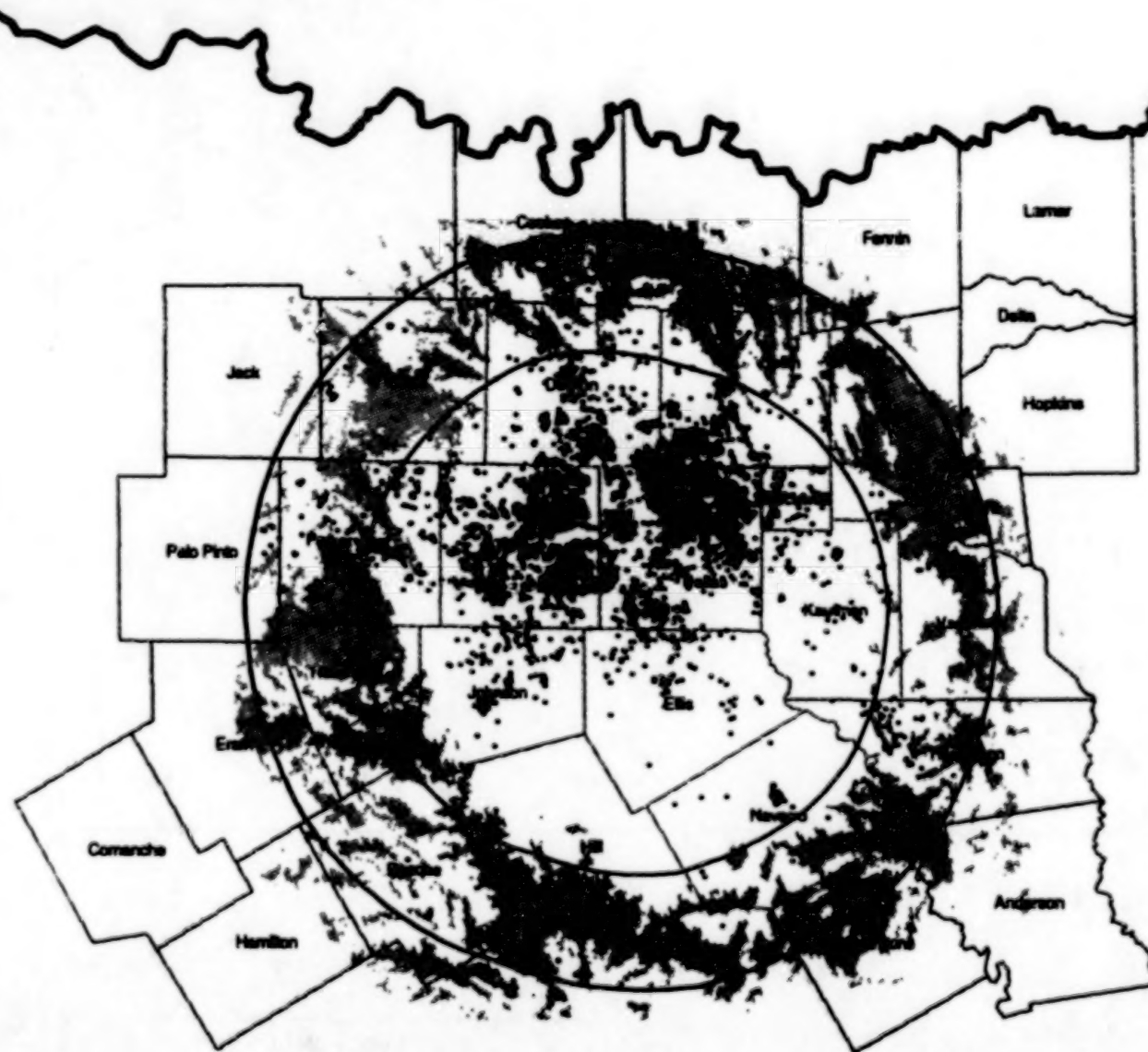


KTVT: Dallas-Fort Worth, TX
A CBS Affiliate

New PrimeTime 24 Subscribers through DirecTV since 1/1/96

Key

-  "B" Signal Coverage Area
-  "A" Signal Coverage Area
-  County Boundary
-  State Boundary
-  PrimeTime 24 Customer
-  FCC Predicted Contours



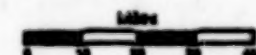
7931 Subscribers in "A" Coverage

8696 Subscribers in "A"&"B" Coverage

8716 Subscribers in FCC A&B Contours

98.5% of Subscribers in FCC A&B Contours
also inside of "A"&"B" Coverage

"A" and "B" Signal Coverage: Longley/Rice
Projection System: Lat/Lon









WJBK: Detroit, MI

A FOX Affiliate

New PrimeTime 24 Subscribers through DirecTV since 1/1/96

Key

-  "B" Signal Coverage Area
-  "A" Signal Coverage Area
-  County Boundary
-  State Boundary
-  PrimeTime 24 Customer
-  FCC Predicted Contours

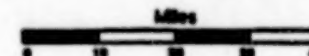
3475 Subscribers in "A" Coverage

5627 Subscribers in "A"&"B" Coverage

5979 Subscribers in FCC A&B Contours

93.3% of Subscribers in FCC A&B Contours
also inside of "A"&"B" Coverage

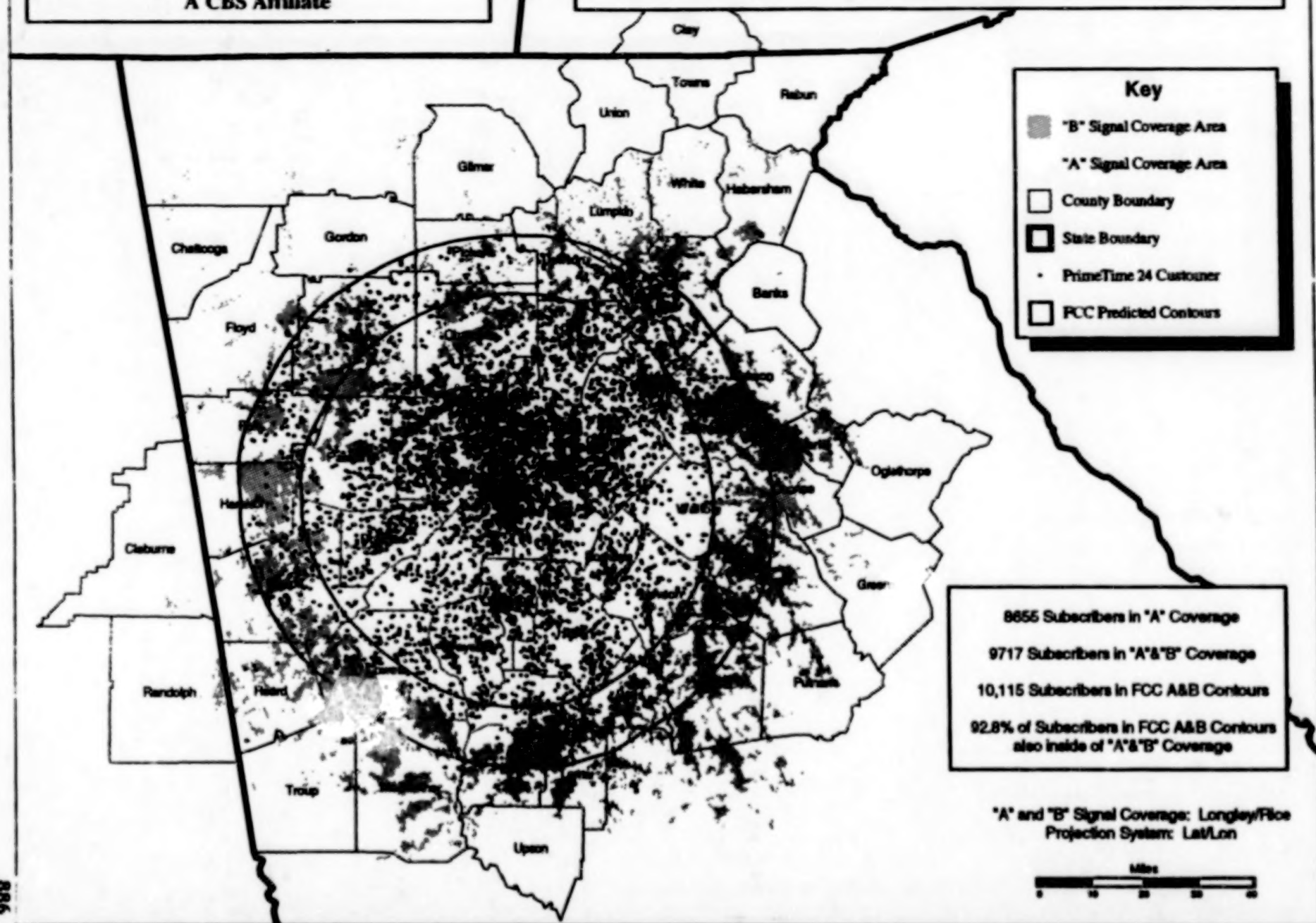
"A" and "B" Signal Coverage: Longley/Rice
Projection System: Lat/Lon



885

WGNX: Atlanta, GA
A CBS Affiliate

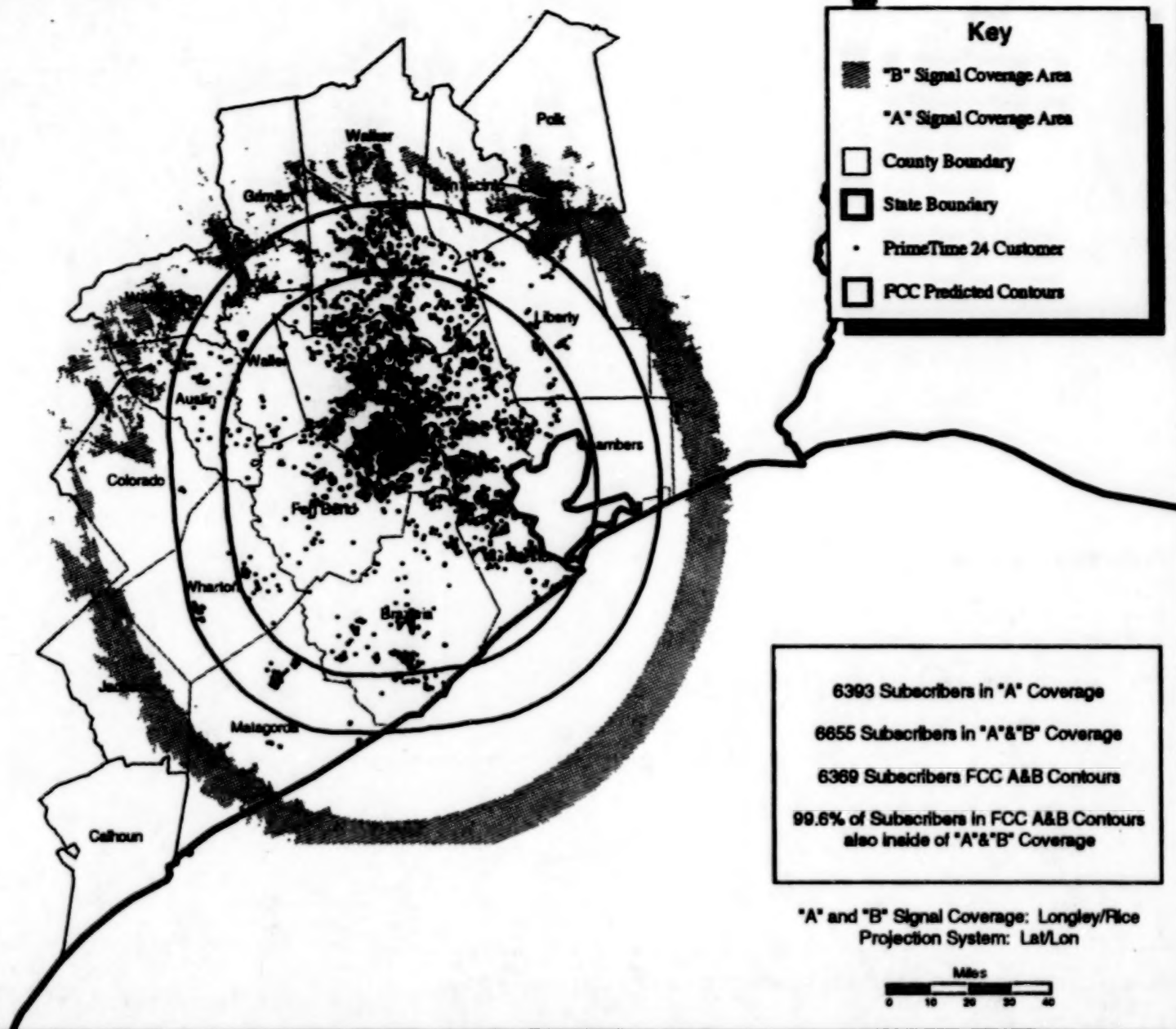
New PrimeTime 24 Subscribers through DirecTV since 1/1/96



KRIV: Houston, TX

A FOX Affiliate

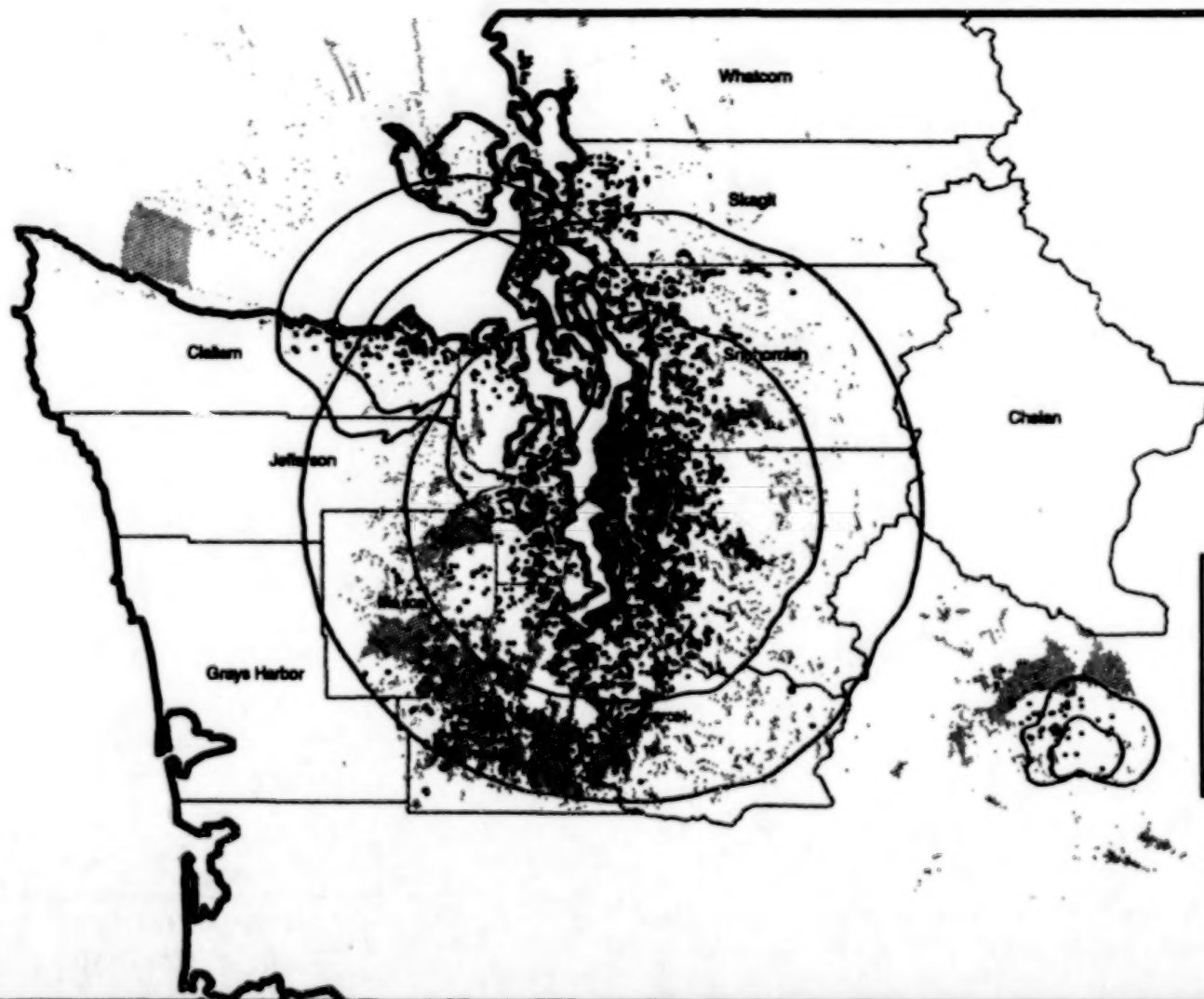
New PrimeTime 24 Subscribers through DirecTV since 1/1/96



888

KSTW: Seattle-Tacoma, WA
A CBS Affiliate

New PrimeTime 24 Subscribers through DirecTV since 1/1/96



Key

- "A" Signal Coverage Area
- "A" Signal Coverage Area
- County Boundary
- State Boundary
- PrimeTime 24 Customer
- FCC Predicted Contours

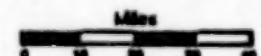
6470 Subscribers in "A" Coverage

7048 Subscribers in "A"&"B" Coverage

7256 Subscribers in FCC A&B Contours

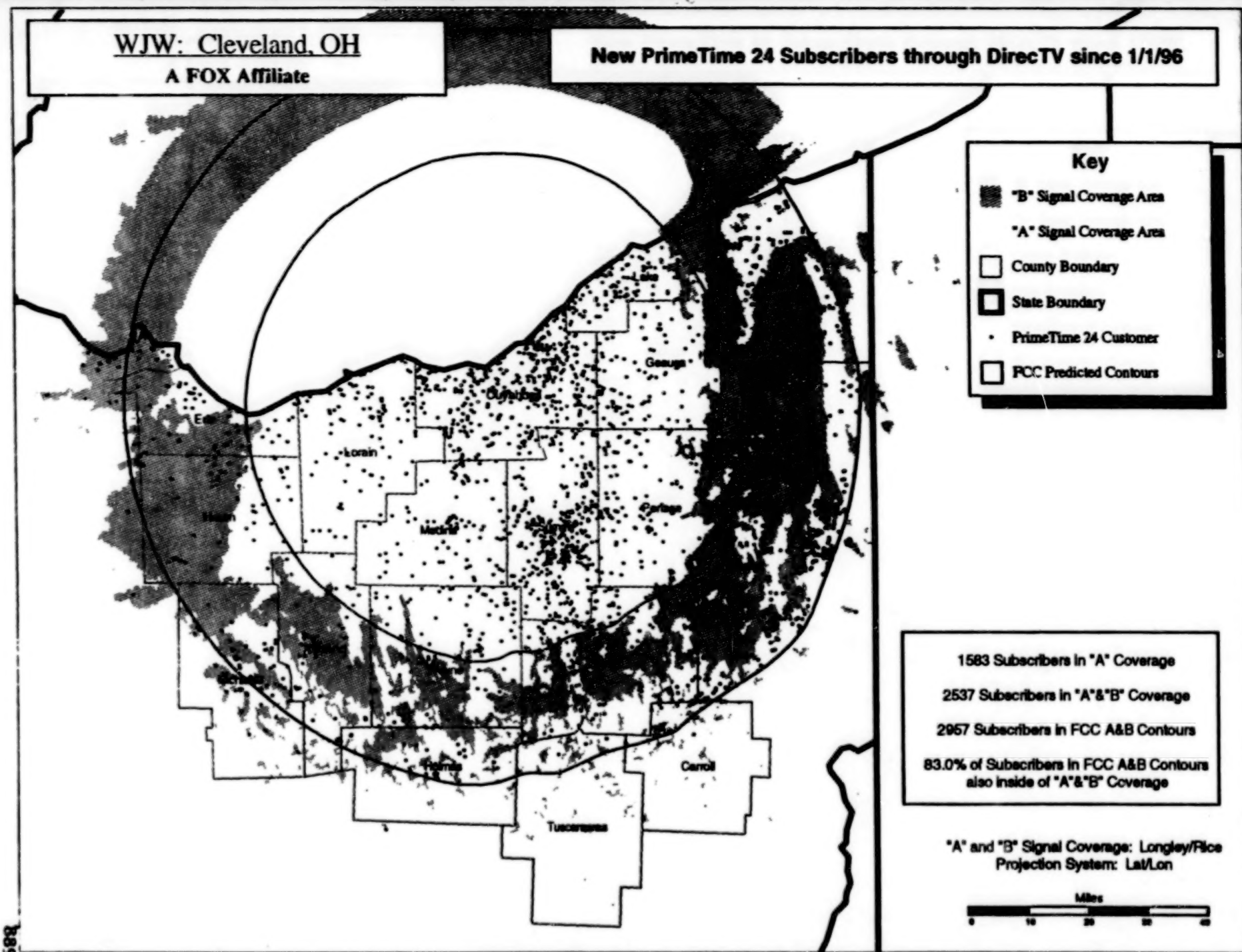
92.2% of Subscribers in FCC A&B Contours
also inside of "A"&"B" Coverage

"A" and "B" Signal Coverage: Longley/Rice
Projection System: Lat/Lon



WJW: Cleveland, OH
A FOX Affiliate







New PrimeTime 24 Subscribers through DirecTV since 1/1/96



WCCO: Minneapolis-St. Paul, MN
A CBS Affiliate

New PrimeTime 24 Subscribers through DirecTV since 1/1/96

Key

-  "B" Signal Coverage Area
-  "A" Signal Coverage Area
-  State Boundary
-  County Boundary
-  PrimeTime 24 Customer
-  FCC Predicted Contours

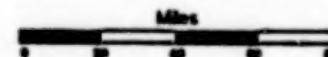
3699 Subscribers in "A" Coverage

5530 Subscribers in "A" & "B" Coverage

5421 Subscribers in FCC A&B Contours

92.0% of Subscribers in FCC A&B Contours
also inside of "A" & "B" Coverage

"A" and "B" Signal Coverage: Longley/Rice
Projection System: Lat/Lon









WTVT: St. Petersburg-Tampa, FL

A FOX Affiliate

New PrimeTime 24 Subscribers through DirecTV since 1/1/96



Key

-  "B" Signal Coverage Area
-  "A" Signal Coverage Area
-  County Boundary
-  State Boundary
-  PrimeTime 24 Customer
-  FCC Predicted Contours

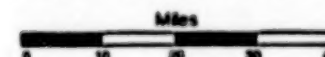
5071 Subscribers in "A" Coverage

6798 Subscribers in "A"&"B" Coverage

6913 Subscribers in FCC A&B Contours

97.4% of Subscribers in FCC A&B Contours
also inside of "A"&"B" Coverage







"A" and "B" Signal Coverage: Longley/Rice
Projection System: Albers US



KFMB: San Diego, CA
A CBS Affiliate

New PrimeTime 24 Subscribers through DirecTV since 1/1/96

Key

-  "B" Signal Coverage Area
-  "A" Signal Coverage Area
-  County Boundary
-  State Boundary
-  PrimeTime 24 Customer
-  FCC Predicted Contours

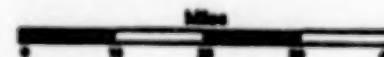
3200 Subscribers in "A" Coverage

3702 Subscribers in "A" & "B" Coverage

4810 Subscribers in FCC A&B Contours

77.2% of Subscribers in FCC A&B Contours
also inside of "A" & "B" Coverage

"A" and "B" Signal Coverage: Longley/Rice
Projection System: Lat/Lon









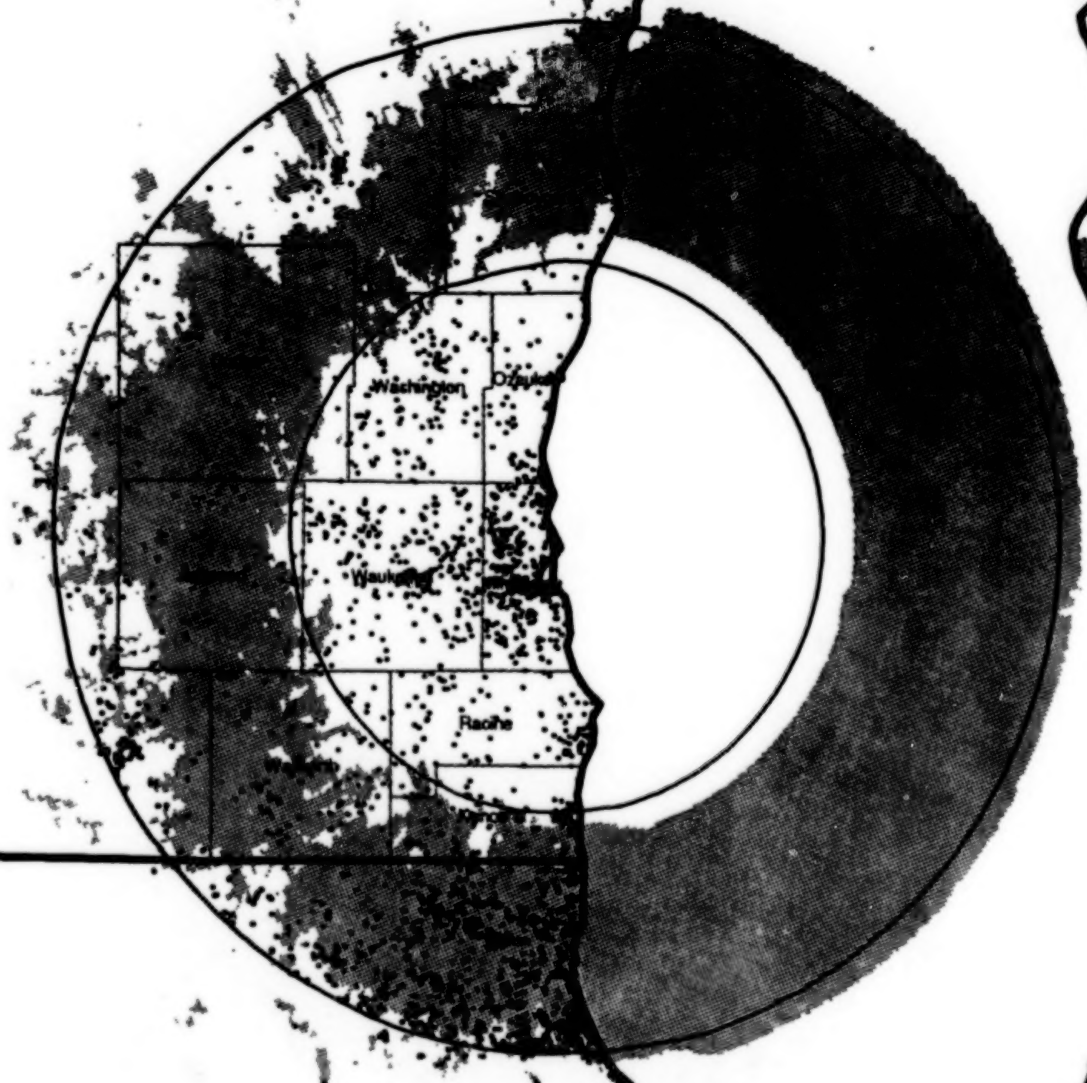
894

WITI: Milwaukee, WI
A FOX Affiliate

New PrimeTime 24 Subscribers through DirecTV since 1/1/96

Key

-  "B" Signal Coverage Area
-  "A" Signal Coverage Area
-  County Boundary
-  State Boundary
-  PrimeTime 24 Customer
-  FCC Predicted Contours



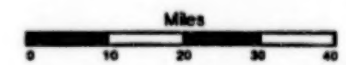
1067 Subscribers in "A" Coverage

2732 Subscribers in "A" & "B" Coverage

3077 Subscribers in FCC A&B Contours

84.9% of Subscribers in FCC A&B Contours
also inside of "A" & "B" Coverage







"A" and "B" Signal Coverage: Longley/Rice
Projection System: Lat/Lon

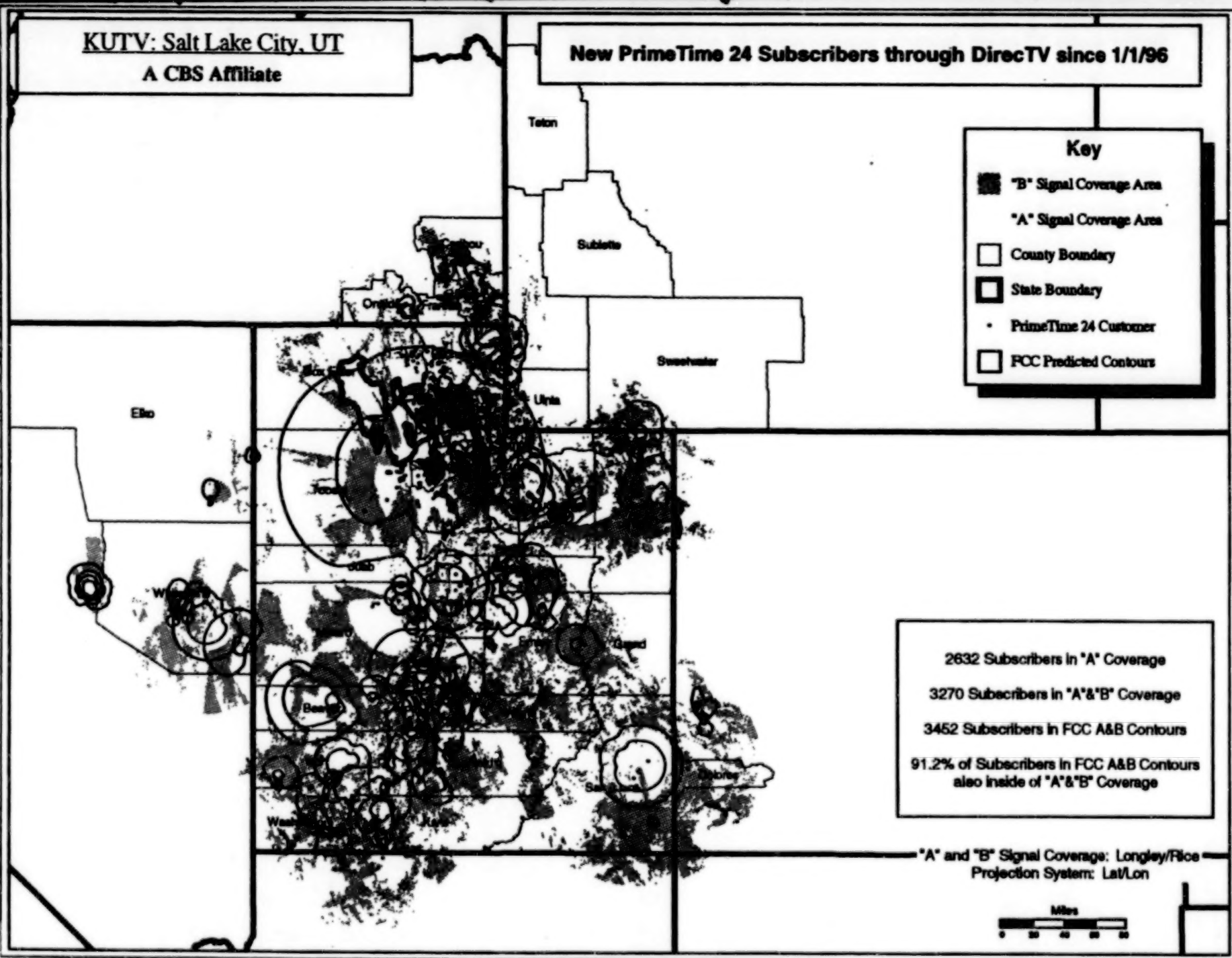


KUTV: Salt Lake City, UT
A CBS Affiliate

New PrimeTime 24 Subscribers through DirecTV since 1/1/96

Key

-  "B" Signal Coverage Area
-  "A" Signal Coverage Area
-  County Boundary
-  State Boundary
-  PrimeTime 24 Customer
-  FCC Predicted Contours



2632 Subscribers in "A" Coverage
 3270 Subscribers in "A"&"B" Coverage
 3452 Subscribers in FCC A&B Contours
 91.2% of Subscribers in FCC A&B Contours
 also inside of "A"&"B" Coverage

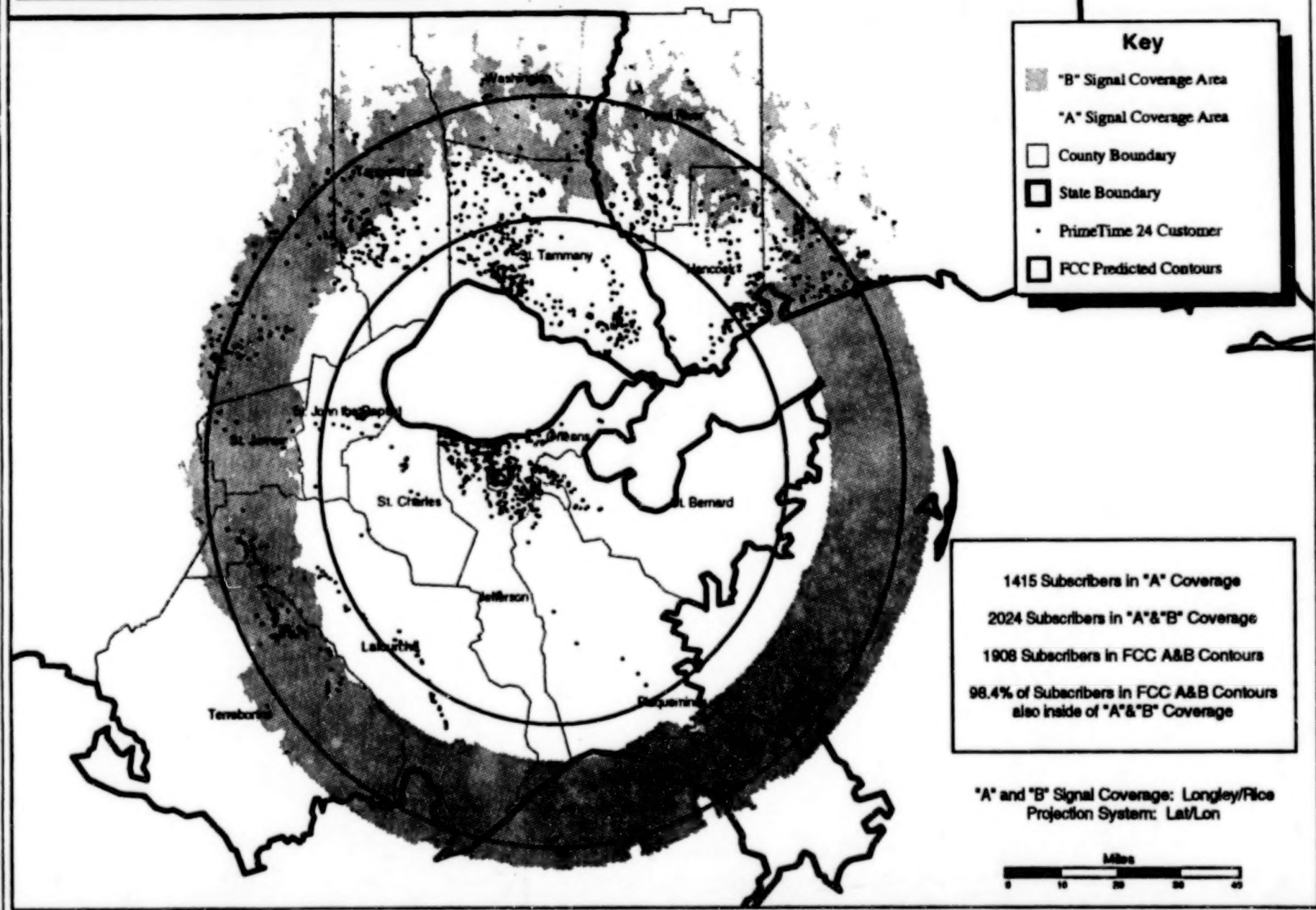
"A" and "B" Signal Coverage: Longley/Rice
 Projection System: Lat/Lon

Miles
 0 20 40 60 80

896

WVUE: New Orleans, LA
A FOX Affiliate

New PrimeTime 24 Subscribers through DirecTV since 1/1/96









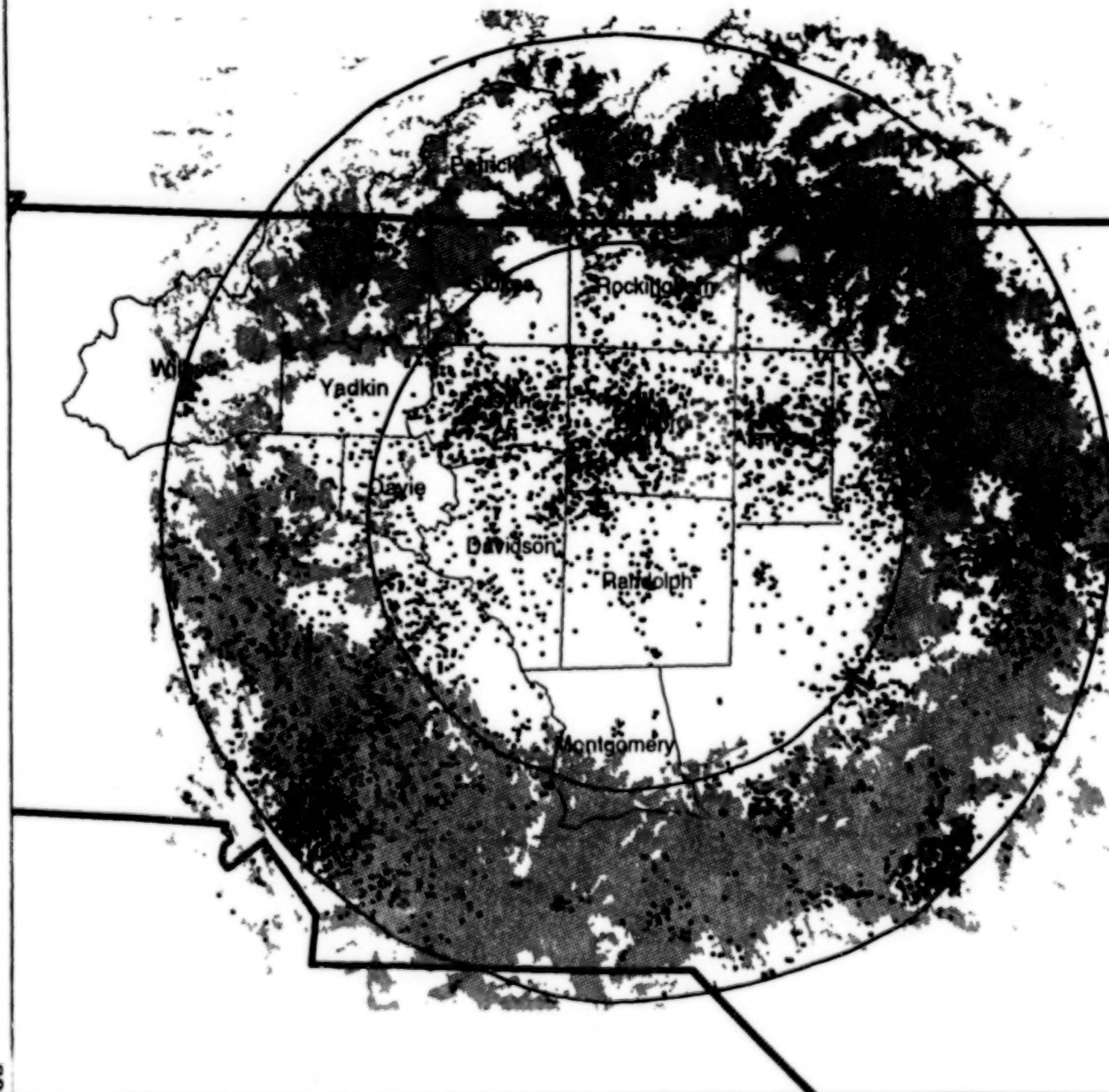
WFMY: Winston-Salem, NC

A CBS Affiliate

New PrimeTime 24 Subscribers through DirecTV since 1/1/96

Key

-  "A" Signal Coverage Area
-  "B" Signal Coverage Area
-  County Boundary
-  State Boundary
-  PrimeTime 24 Customer
-  FCC Predicted Contours



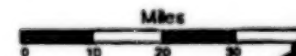
4690 Subscribers in "A" Coverage

10,504 Subscribers in "A" & "B" Coverage

11,752 Subscribers in FCC A&B Contours

87.8% of Subscribers in FCC A&B Contours
also inside of "A" & "B" Coverage

"A" and "B" Signal Coverage: Longley/Rice
Projection System: Lat/Lon









895

WBRC: Birmingham, AL

A FOX Affiliate

New PrimeTime 24 Subscribers through DirecTV since 1/1/96

Key

-  "B" Signal Coverage Area
-  "A" Signal Coverage Area
-  County Boundary
-  State Boundary
-  PrimeTime 24 Customer
-  FCC Predicted Contours

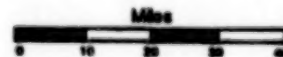
2540 Subscribers in "A" Coverage

3625 Subscribers in "A"&"B" Coverage

4137 Subscribers in FCC A&B Contours

82.4% of Subscribers in FCC A&B Contours
also inside of "A"&"B" Coverage

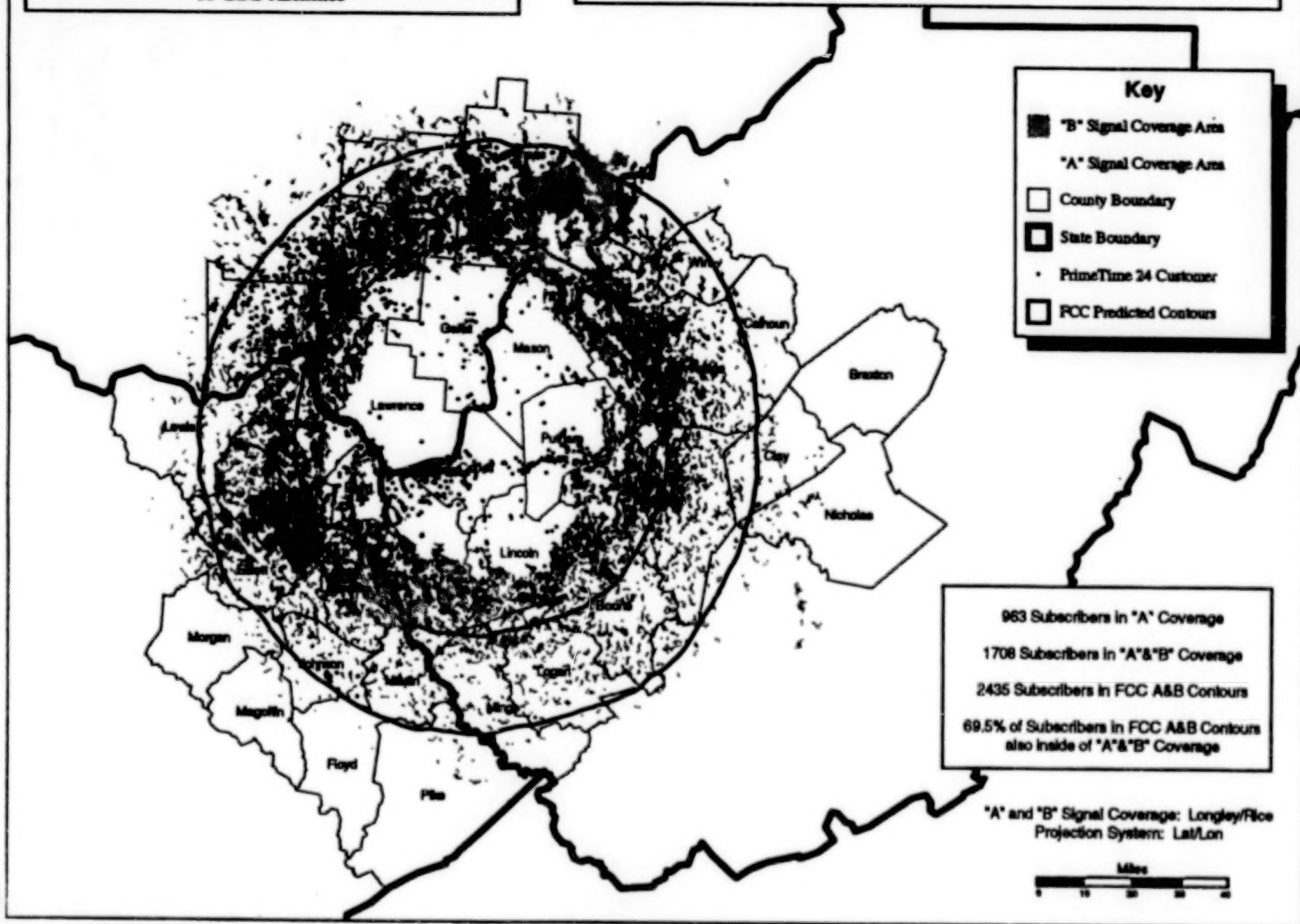
"A" and "B" Signal Coverage: Longley/Rice
Projection System: Lat/Lon



WOWK: Charleston-Huntington, WV

A CBS Affiliate

New PrimeTime 24 Subscribers through DirecTV since 1/1/96









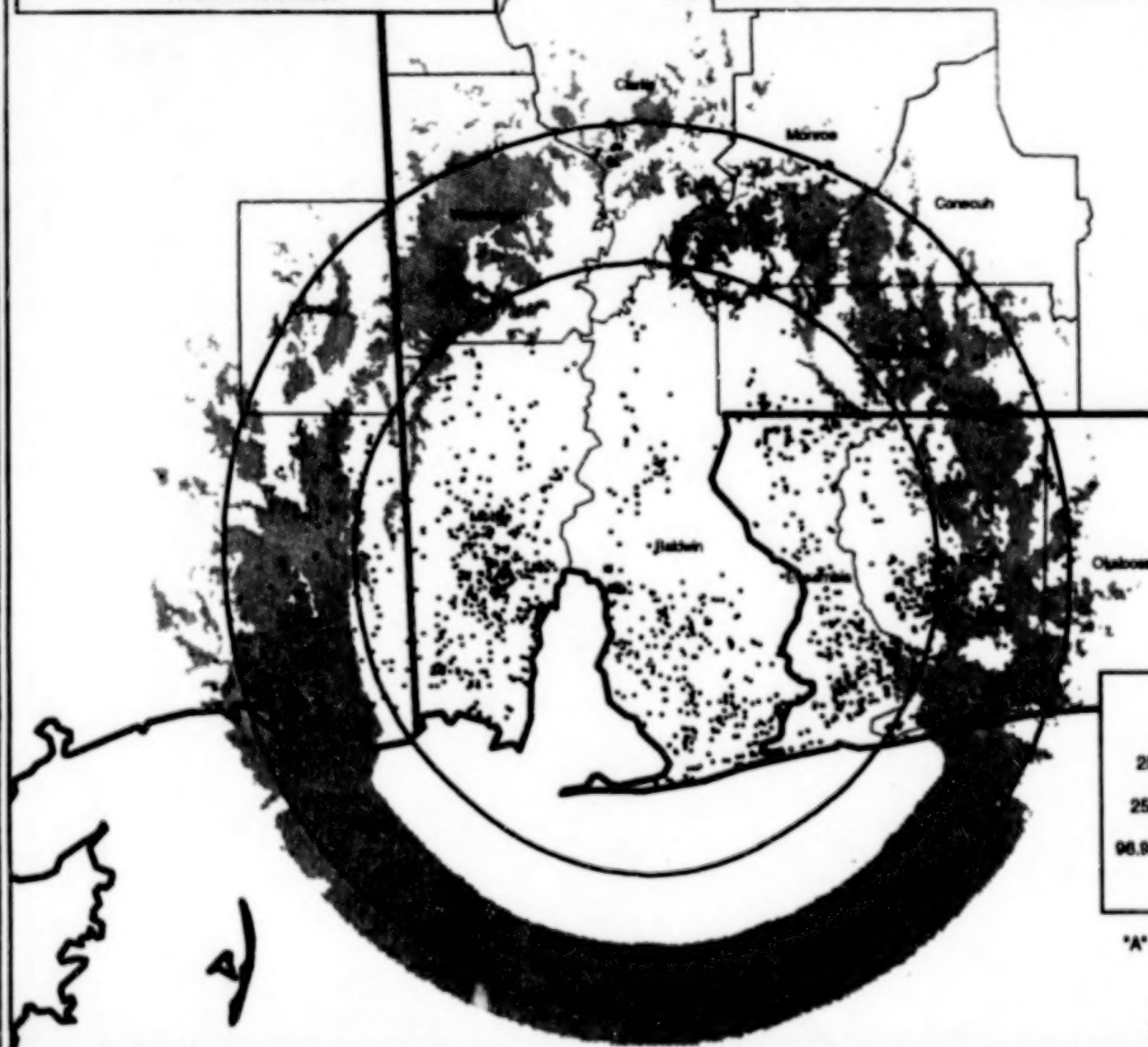
900

WALA: Mobile-Pensacola
A FOX Affiliate

New PrimeTime 24 Subscribers through DirecTV since 1/1/96

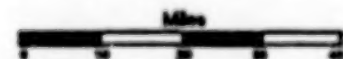
Key

-  "B" Signal Coverage Area
-  "A" Signal Coverage Area
-  County Boundary
-  State Boundary
-  PrimeTime 24 Customer
-  FCC Predicted Contours



1841 Subscribers in "A" Coverage
2503 Subscribers in "A" & "B" Coverage
2548 Subscribers in FCC A&B Contours
96.9% of Subscribers in FCC A&B Contours
also inside of "A" & "B" Coverage

"A" and "B" Signal Coverage: Longley/Rice
Projection System: Lat/Lon









WTOL: Toledo, OH

A CBS Affiliate

New PrimeTime 24 Subscribers through DirecTV since 1/1/96

Key

-  "B" Signal Coverage Area
-  "A" Signal Coverage Area
-  County Boundary
-  State Boundary
-  PrimeTime 24 Customer
-  FCC Predicted Contours

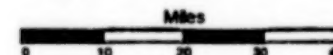
1897 Subscribers in "A" Coverage

3832 Subscribers in "A"&"B" Coverage

3333 Subscribers FCC A&B Contours

95.7% of Subscribers in FCC A&B Contours
also inside of "A"&"B" Coverage

"A" and "B" Signal Coverage: Lingley/Rice
Projection System: Lat/Lon

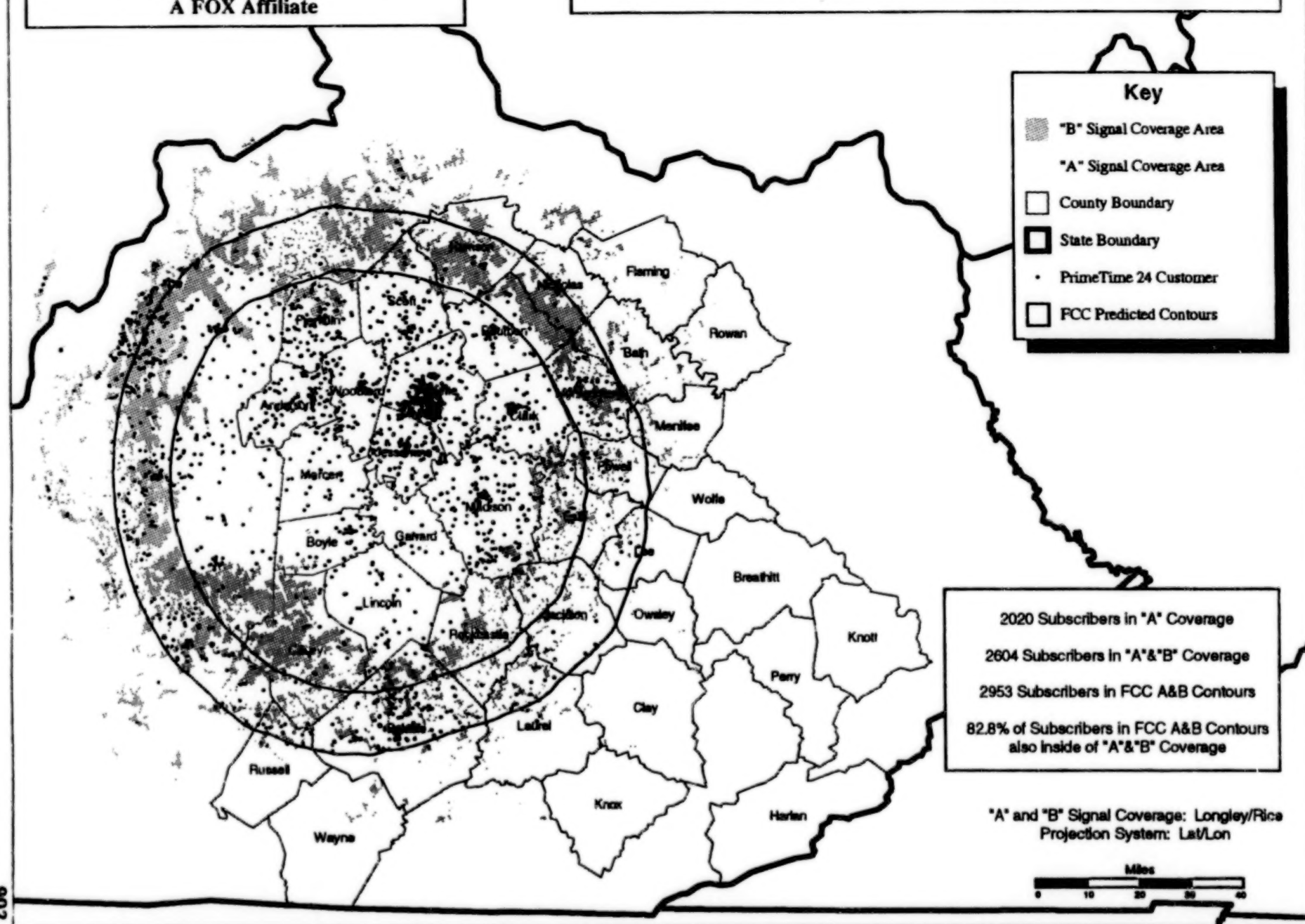


901

WDKY: Lexington, KY

A FOX Affiliate

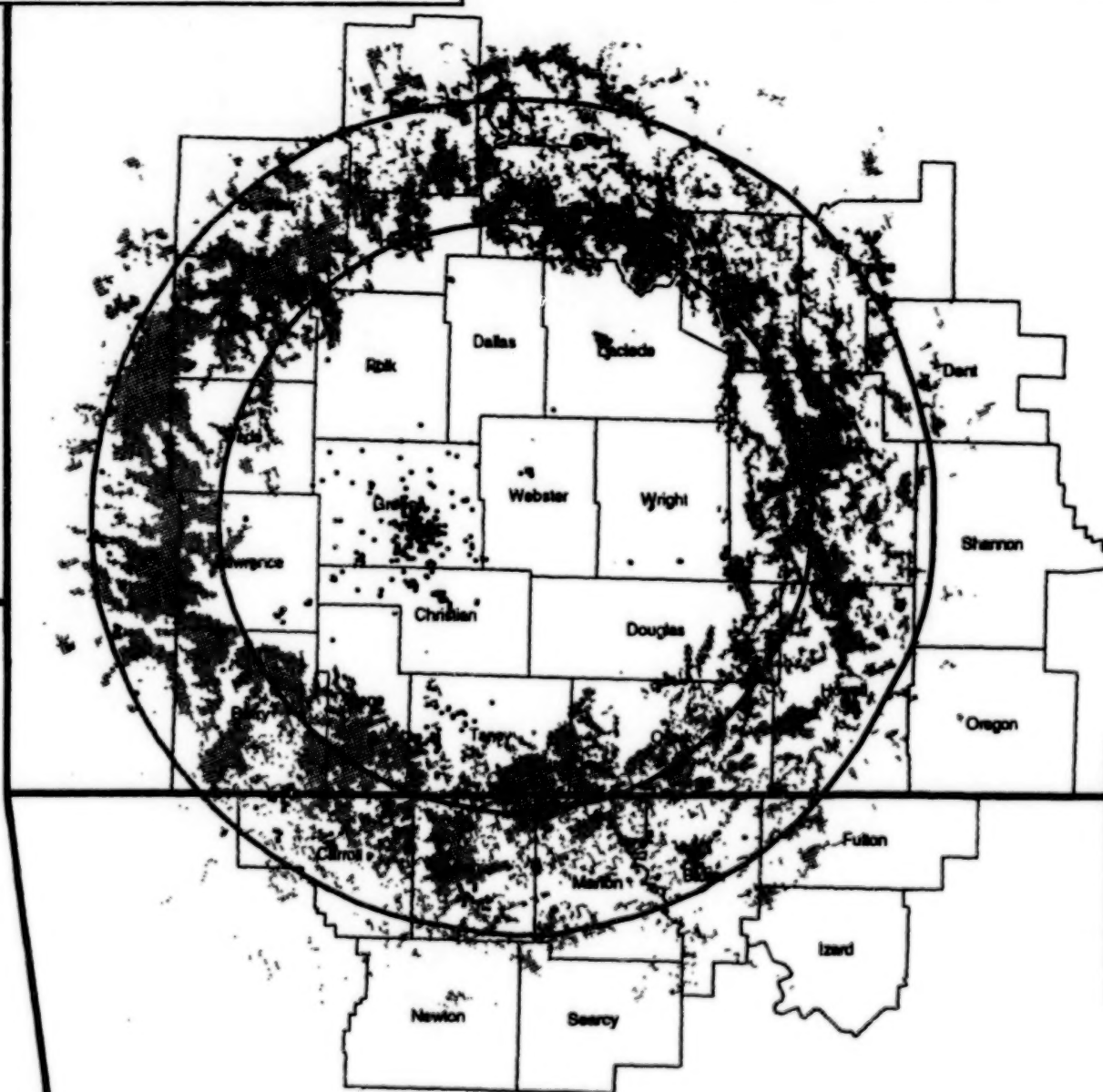
New PrimeTime 24 Subscribers through DirecTV since 1/1/96



KOLR: Springfield, MO

A CBS Affiliate

New PrimeTime 24 Subscribers through DirecTV since 1/1/96



Key

- "B" Signal Coverage
- "A" Signal Coverage
- County Boundary
- State Boundary
- PrimeTime 24 Customer
- FCC Predicted Contours

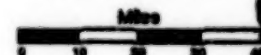
610 Subscribers in "A" Coverage

926 Subscribers in "A"&"B" Coverage

704 Subscribers FCC A&B Contours

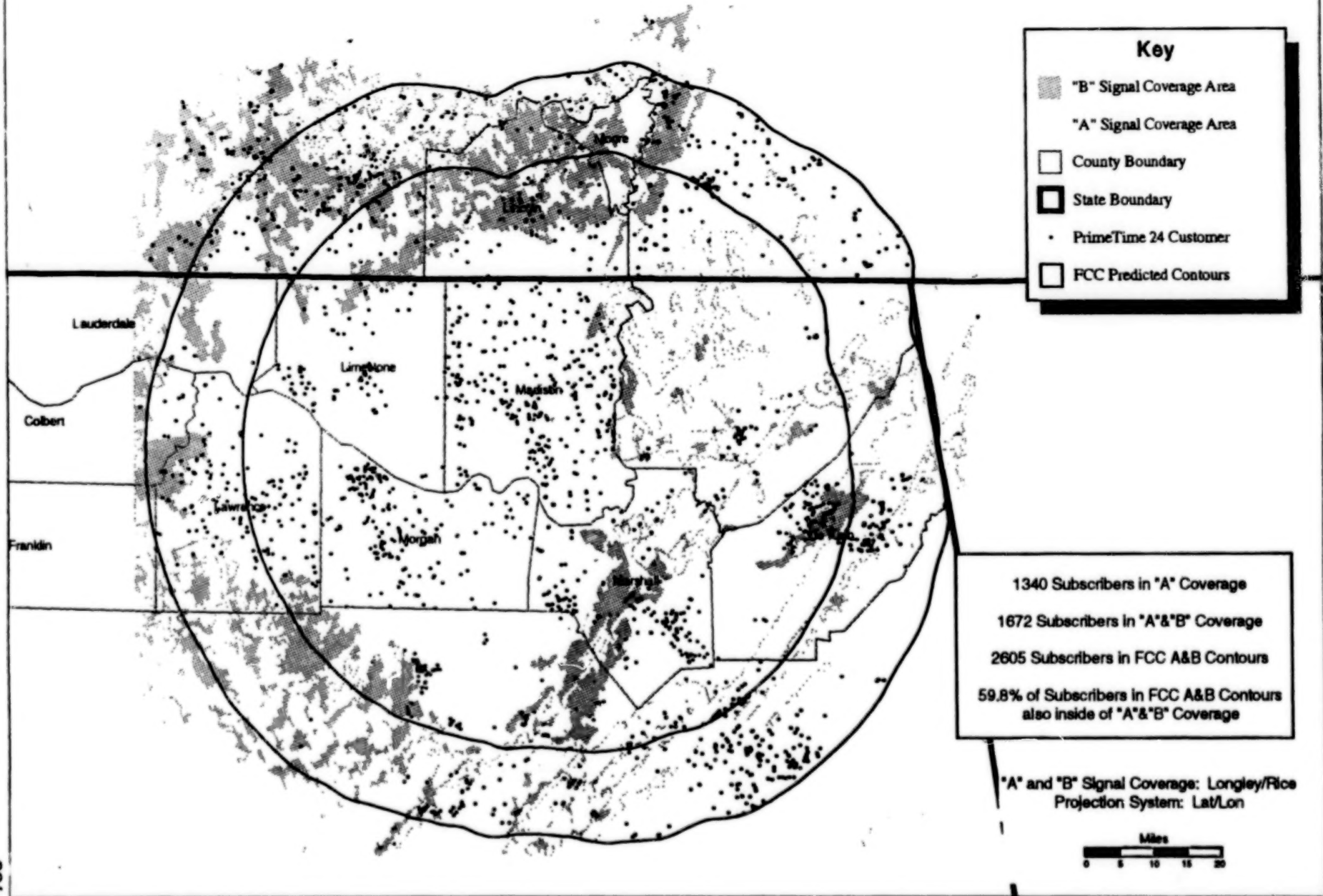
55.4% of Subscribers in FCC A&B Contours
also inside of "A"&"B" Coverage

"A" and "B" Signal Coverage: Longley/Rice
Projection System: Lat/Lon



WZDX: Huntsville, AL
A FOX Affiliate

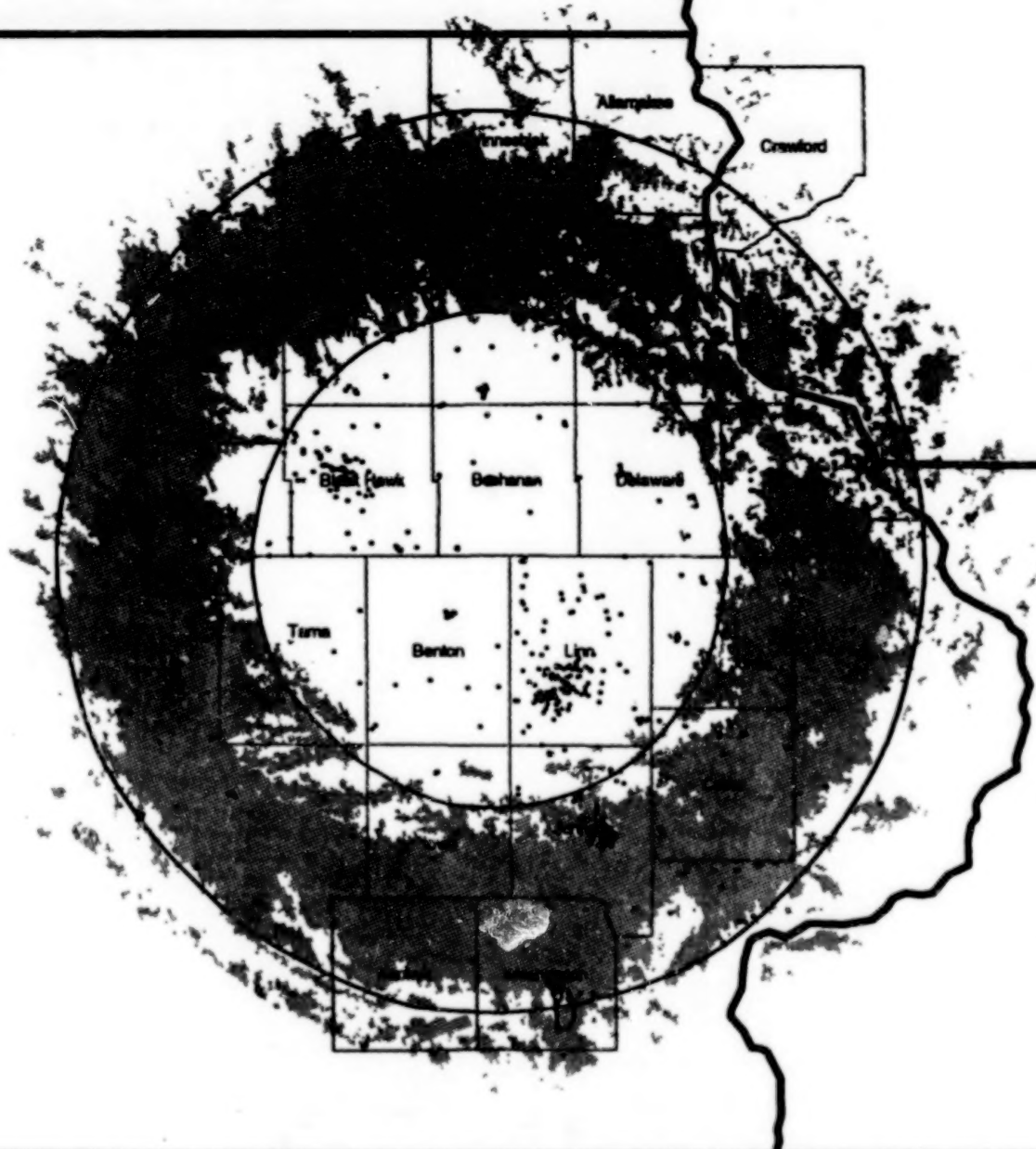
New PrimeTime 24 Subscribers through DirecTV since 1/1/96









KGAN: Cedar Rapids-Waterloo, IA

A CBS Affiliate

New PrimeTime 24 Subscribers through DirecTV since 1/1/96



Key

-  "B" Signal Coverage Area
-  "A" Signal Coverage Area
-  County Boundary
-  State Boundary
-  PrimeTime 24 Customer
-  FCC Predicted Contours

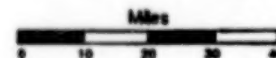
475 Subscribers in "A" Coverage

1173 Subscribers in "A" & "B" Coverage

1362 Subscribers in FCC A&B Contours

81.2% of Subscribers in FCC A&B Contours
also inside of "A" & "B" Coverage

"A" and "B" Signal Coverage: Longley/Rice
Projection System: Lat/Lon

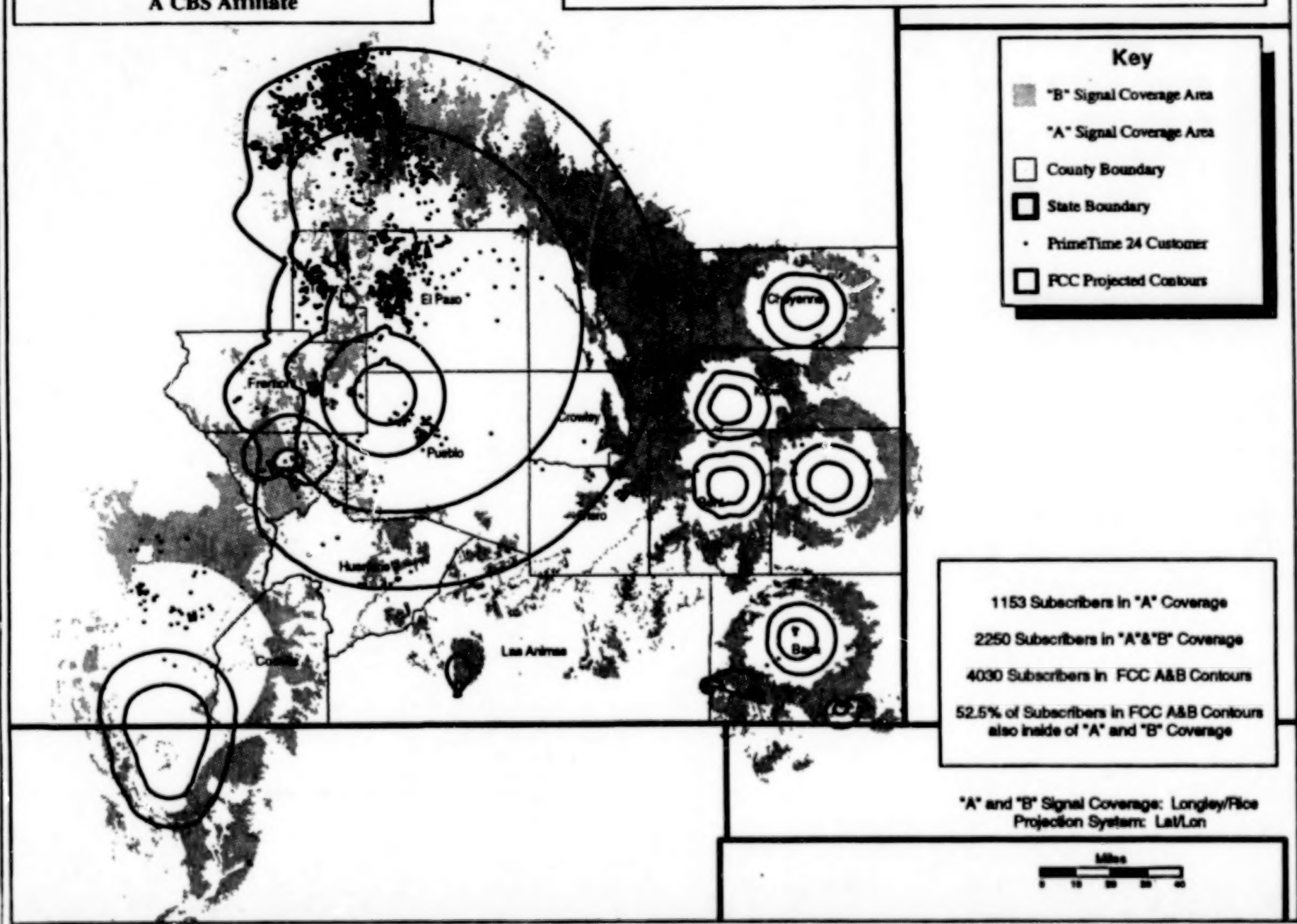


905

KKTV: Colorado Springs-Pueblo, CO

A CBS Affiliate

New PrimeTime 24 Subscribers through DirecTV since 1/1/96

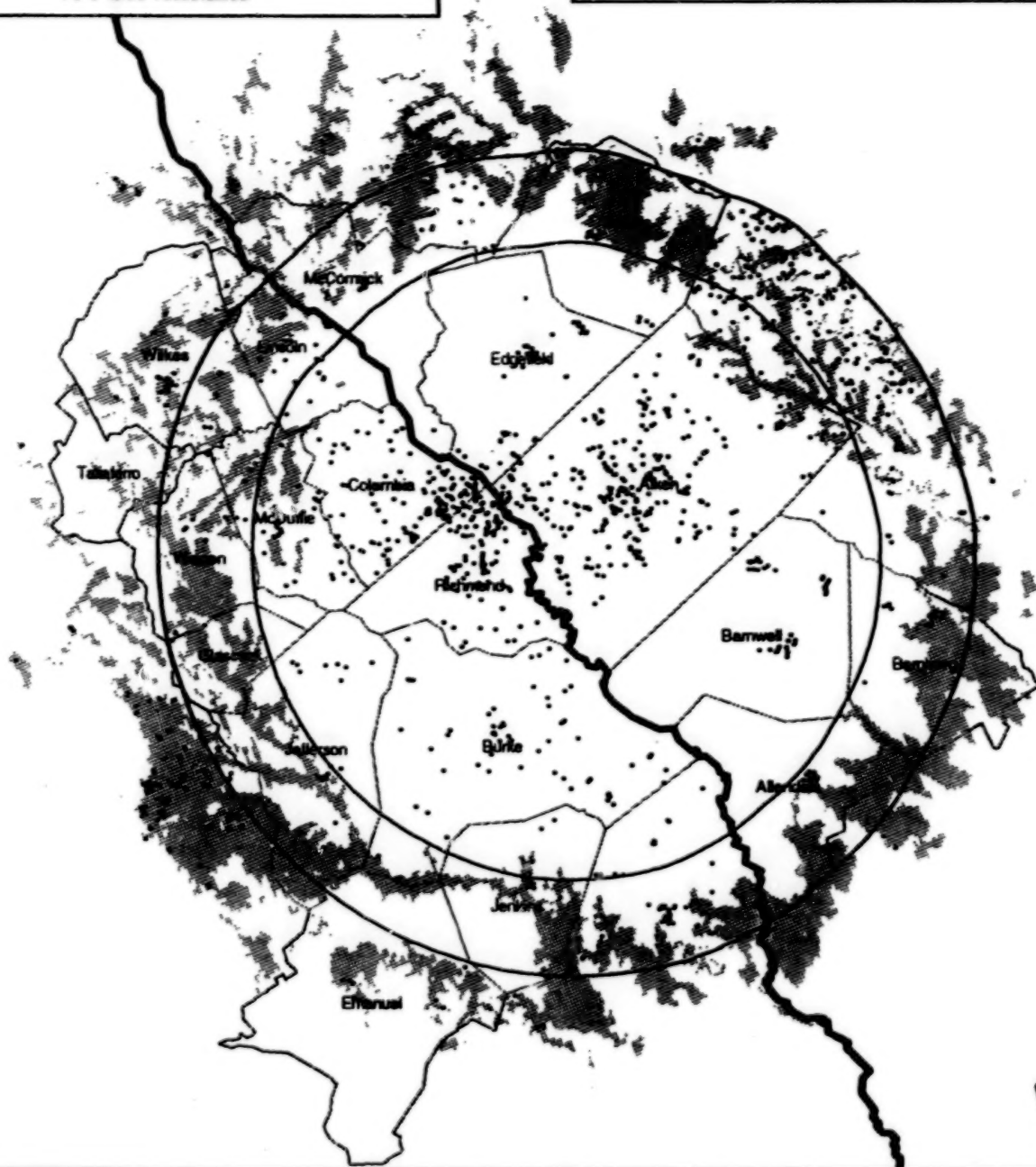


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PAGE

WFXG: Augusta, GA
A FOX Affiliate

New PrimeTime 24 Subscribers through DirecTV since 1/1/96



Key

- "B" Signal Coverage Area
- "A" Signal Coverage Area
- County Boundary
- State Boundary
- PrimeTime 24 Customer
- FCC Predicted Contours

1330 Subscribers in "A" Coverage

1954 Subscribers in "A"&"B" Coverage

1725 Subscribers in FCC A&B Contours

89.0% of Subscribers in FCC A&B Contours
also inside of "A"&"B" Coverage

"A" and "B" Signal Coverage: Longley/Rice
Projection System: Lat/Lon

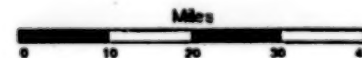
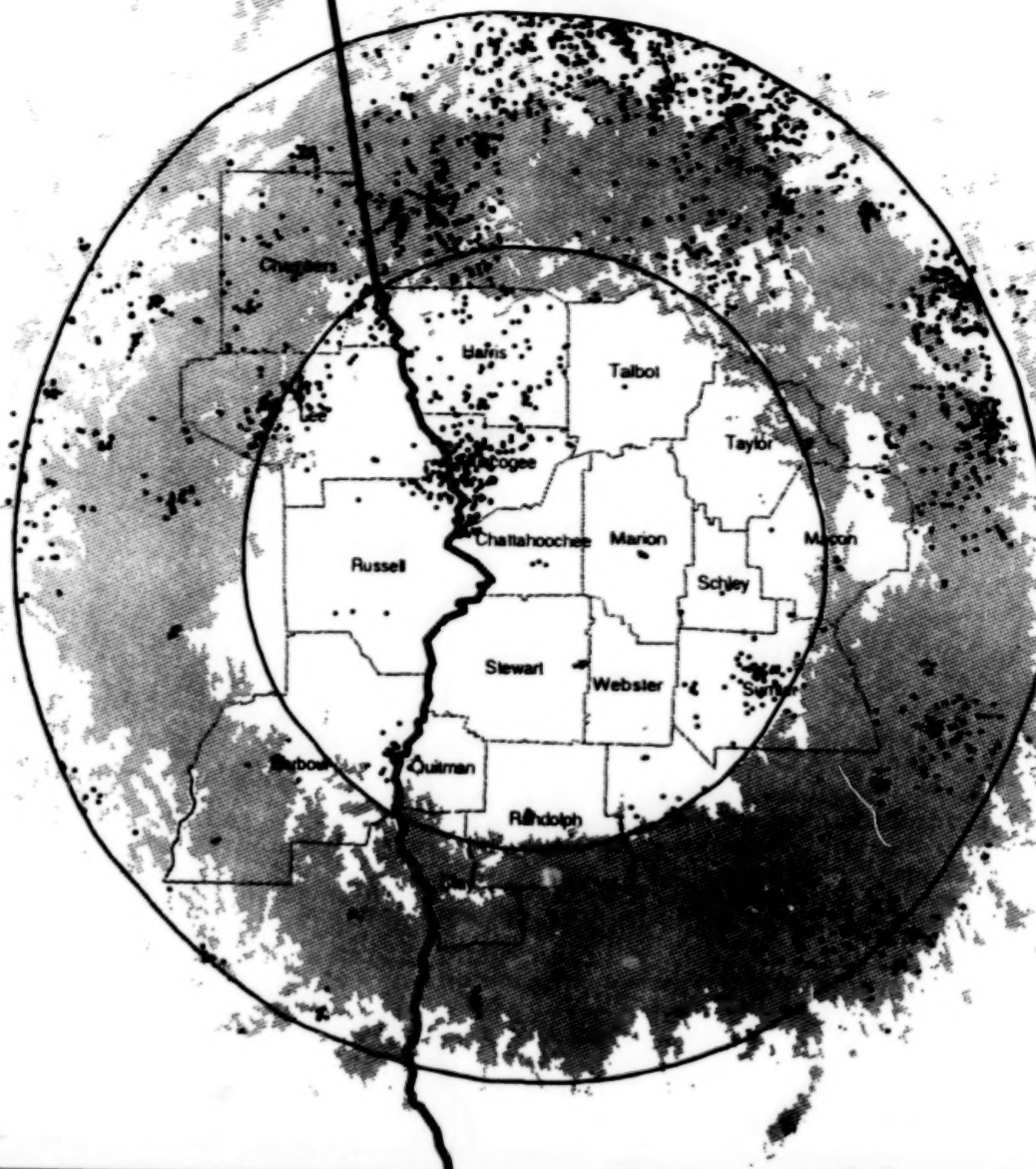








EXHIBIT 3

WRBL: Columbus, GA
A CBS Affiliate

New PrimeTime 24 Subscribers through DirecTV since 1/1/96

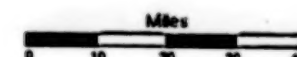


Key

-  "B" Signal Coverage Area
-  "A" Signal Coverage Area
-  County Boundary
-  State Boundary
-  PrimeTime 24 Customer
-  FCC Predicted Contours

824 Subscribers in "A" Coverage
 2925 Subscribers in "A" & "B" Coverage
 3648 Subscribers in FCC A&B Contours
 74.3% of Subscribers in FCC A&B Contours
 also inside of "A" & "B" Coverage

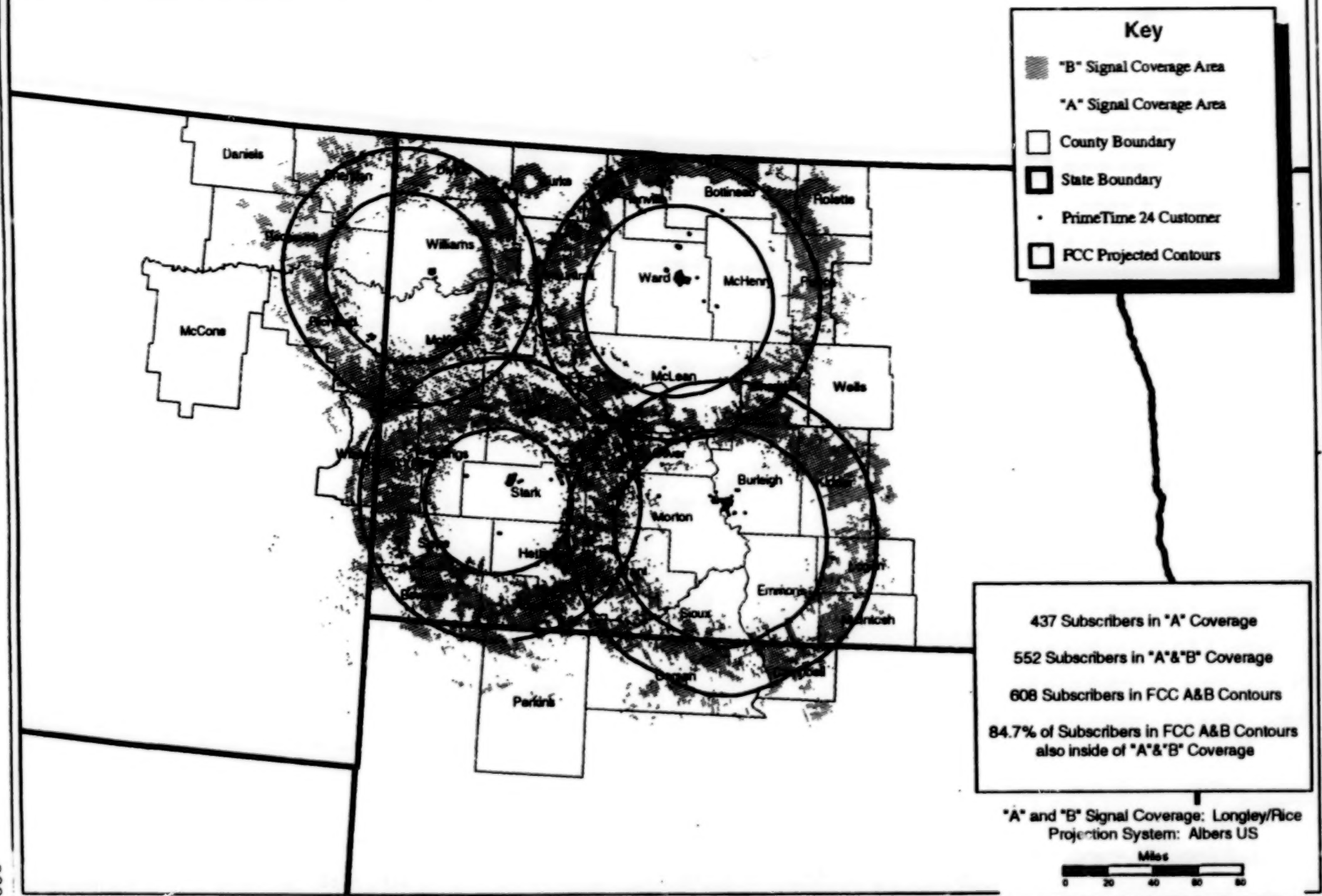
"A" and "B" Signal Coverage: Longley/Rice
 Projection System: Lat/Lon



KXMC: Minot-Bismark, ND

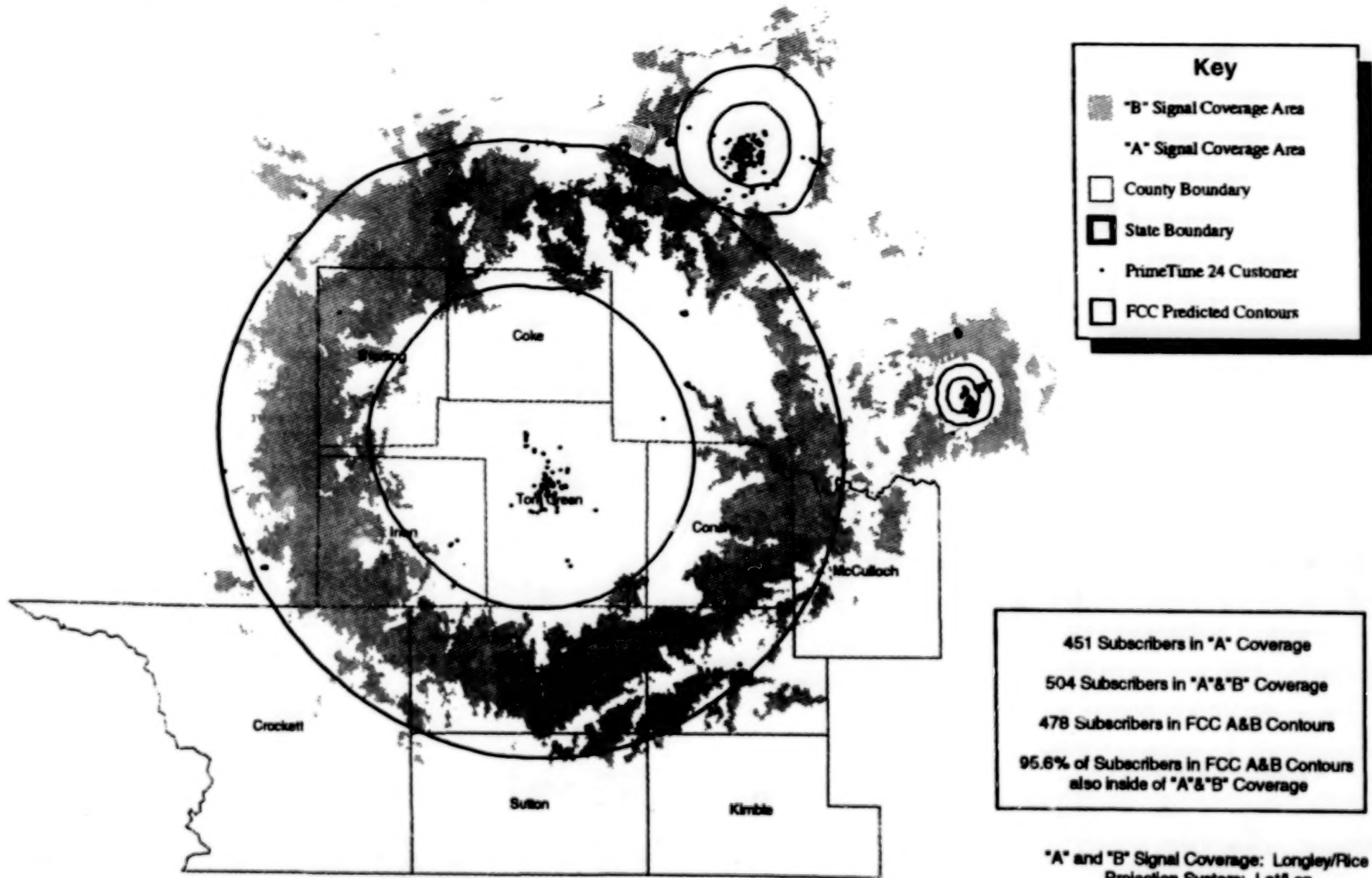
A CBS Affiliate

New PrimeTime 24 Subscribers through DirecTV since 1/1/96



KIDY: San Angelo, TX
A FOX Affiliate







New PrimeTime 24 Subscribers through DirecTV since 1/1/96

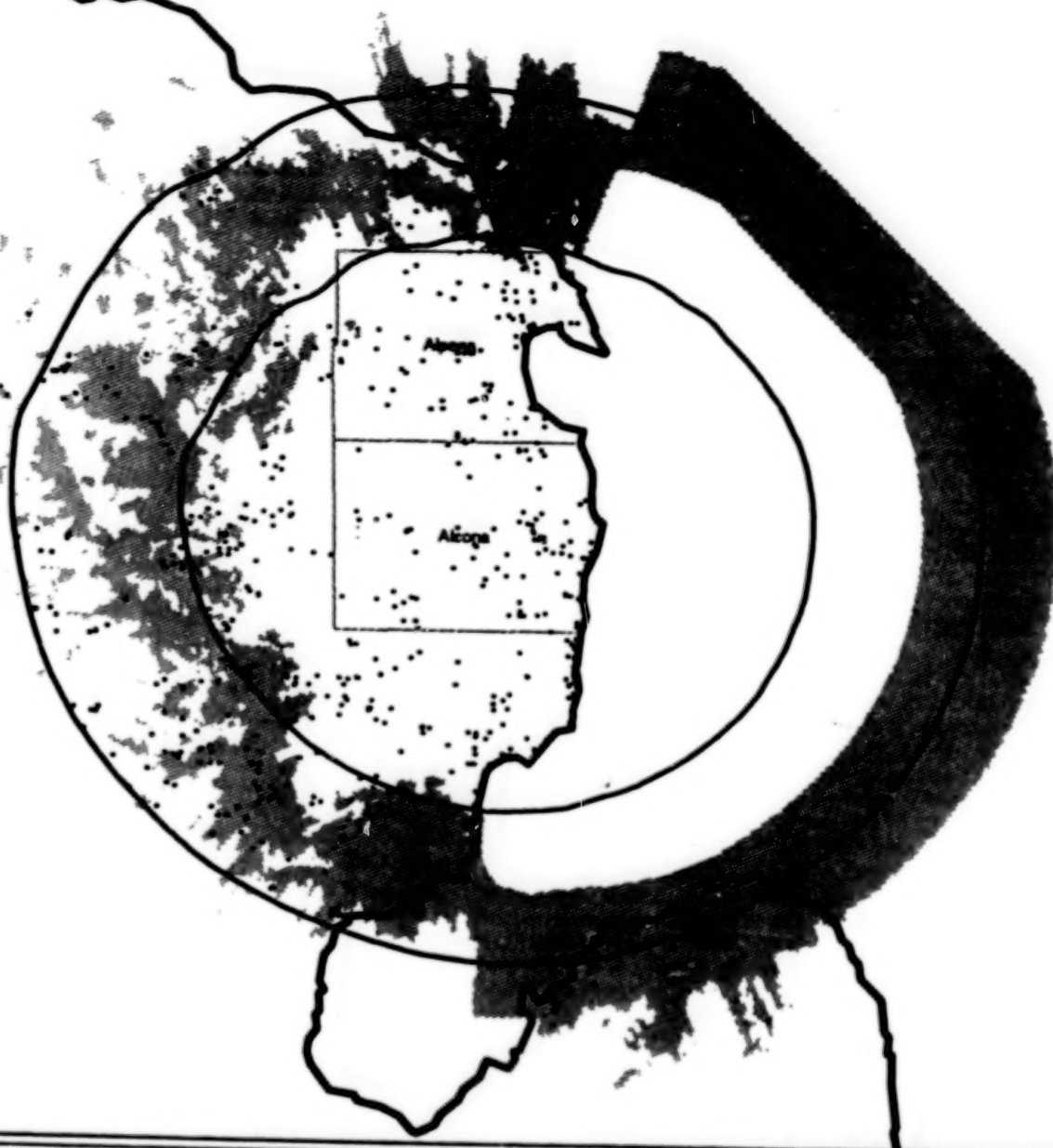


WBKB: Alpena, MI
A CBS Affiliate

New PrimeTime 24 Subscribers through DirecTV since 1/1/96

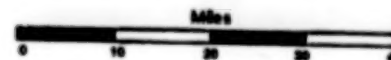
Key

-  "B" Signal Coverage Area
-  "A" Signal Coverage Area
-  County Boundary
-  State Boundary
-  PrimeTime 24 Customer
-  FCC Predicted Contours



412 Subscribers in "A" Coverage
656 Subscribers in "A"&"B" Coverage
716 Subscribers in FCC A&B Contours
86.2% of Subscribers in FCC A&B Contours
also inside of "A"&"B" Coverage

"A" and "B" Signal Coverage: Longley/Rice
Projection System: Lat/Lon








911

9/2

WSVN: Miami, FL
A FOX Affiliate

New PrimeTime 24 Subscribers through DirecTV since 1/1/96

Key

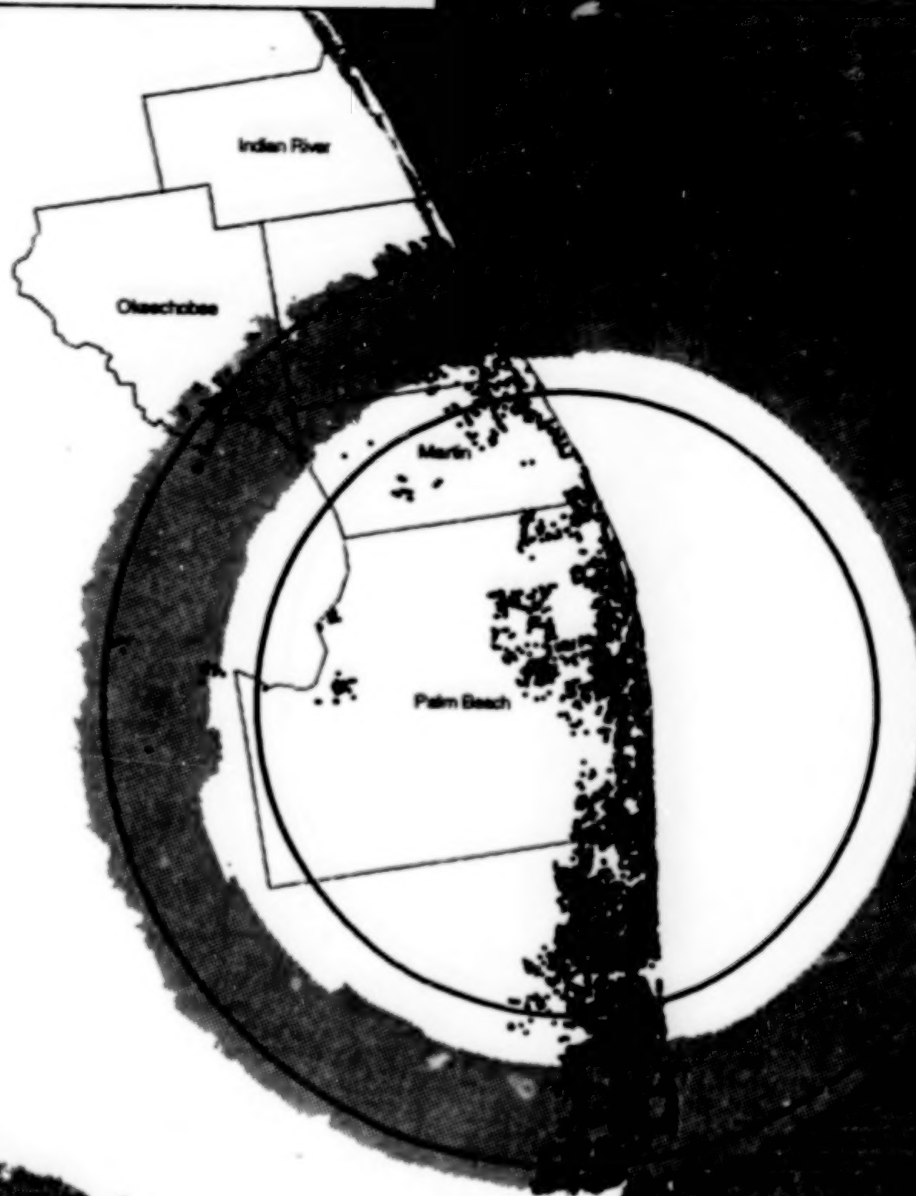
-  "B" Signal Coverage Area
-  "A" Signal Coverage Area
-  County Boundary
-  PrimeTime 24 Customer
-  FCC Predicted Contours

7422 Subscribers in "A" Coverage
8917 Subscribers in "A"&"B" Coverage
8776 Subscribers in FCC A&B Contours
100% of Subscribers in FCC A&B Contours
also inside of "A"&"B" Coverage






EXHIBIT 4

WV PEC: West Palm Beach, FL
A CBS Affiliate

New PrimeTime 24 Subscribers through DirecTV since 1/1/96



Key

-  "B" Signal Coverage Area
-  "A" Signal Coverage Area
-  County Boundary
-  PrimeTime 24 Customer
-  FCC Predicted Contours

6624 Subscribers in "A" Coverage

8790 Subscribers in "A" & "B" Coverage

8417 Subscribers in FCC A&B Contours






100% of Subscribers in FCC A&B Contours
 also inside of "A" & "B" Coverage

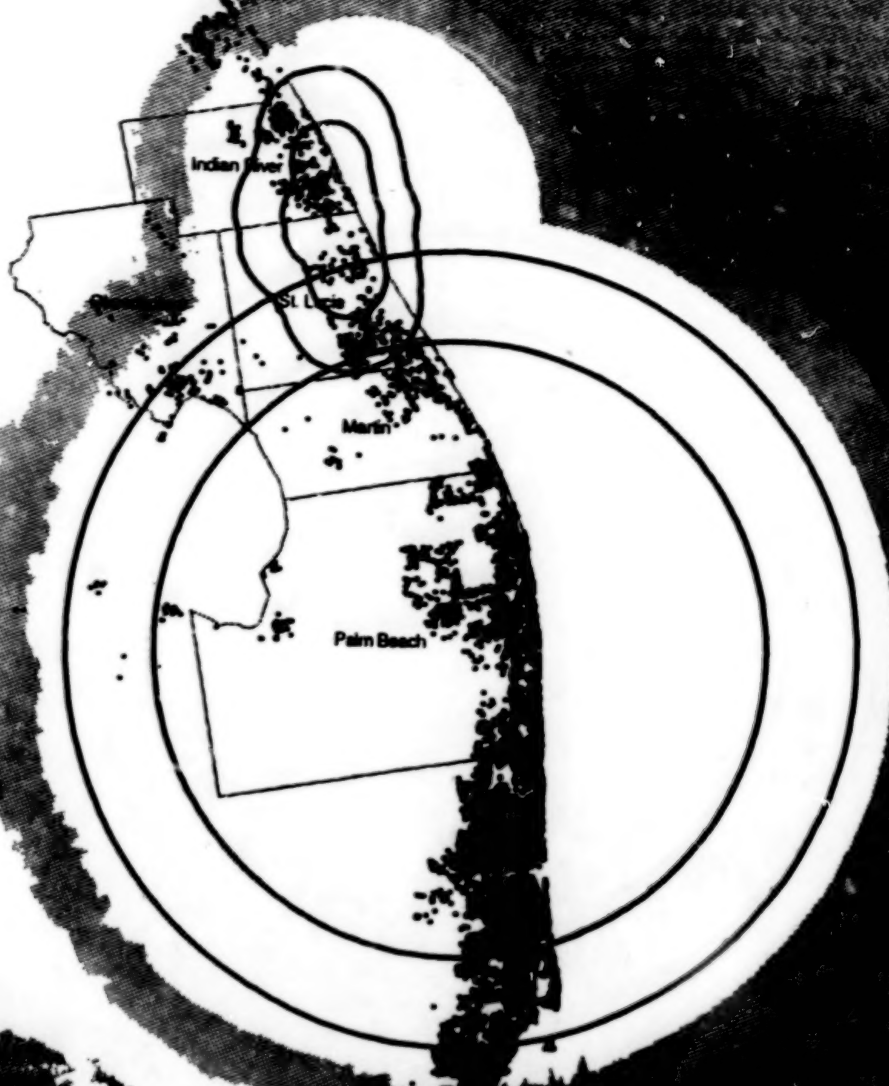
914

WFLX: West Palm Beach, FL
A FOX Affiliate

New PrimeTime 24 Subscribers through DirecTV since 1/1/96

Key

-  "B" Signal Coverage Area
-  "A" Signal Coverage Area
-  County Boundary
-  PrimeTime 24 Customer
-  FCC Predicted Contours



9895 Subscribers in "A" Coverage

10,309 Subscriber in "A"&"B" Coverage

9138 Subscribers in FCC A&B Contours

100% of Subscribers in FCC A&B Contours
also inside of "A"&"B" Coverage

WJXT: Jacksonville, FL
A CBS Affiliate

New PrimeTime 24 Subscribers through DirecTV since 1/1/96

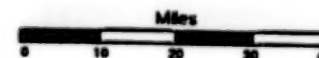


Key

- "B" Signal Coverage Area
- "A" Signal Coverage Area
- County Boundary
- State Boundary
- PrimeTime 24 Customer
- FCC Predicted Contours

1791 Subscribers in "A" Coverage
2805 Subscribers in "A"&"B" Coverage
2906 Subscribers in FCC A&B Contours
95.1% of Subscribers in FCC A&B Contours
also inside of "A"&"B" Coverage

"A" and "B" Signal Coverage: Longley/Rice
Projection System: Albers US








516

915

WFOR: Miami, FL
A CBS Affiliate

New PrimeTime 24 Subscribers through DirecTV since 1/1/96

Key

-  "B" Signal Coverage Area
-  "A" Signal Coverage Area
-  County Boundary
-  PrimeTime 24 Customer
-  FCC Predicted Contours

Broward

Dade

6963 Subscribers in "A" Coverage

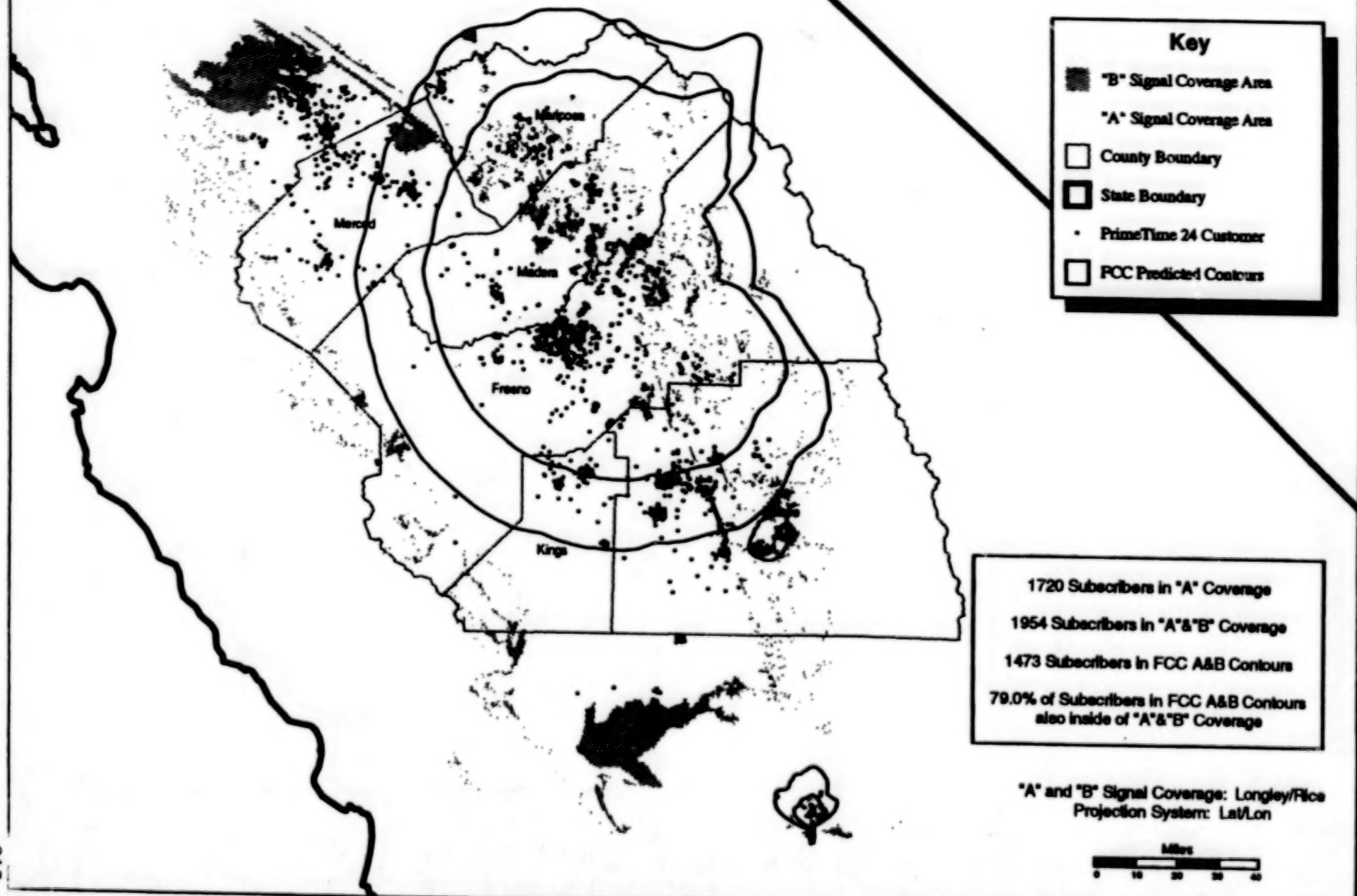
8777 Subscribers in "A"&"B" Coverage

8730 Subscribers in FCC A&B Contours

99.98% of Subscribers in FCC A&B Contours
also inside of "A"&"B" Coverage

KJEO: Fresno, CA
A CBS Affiliate

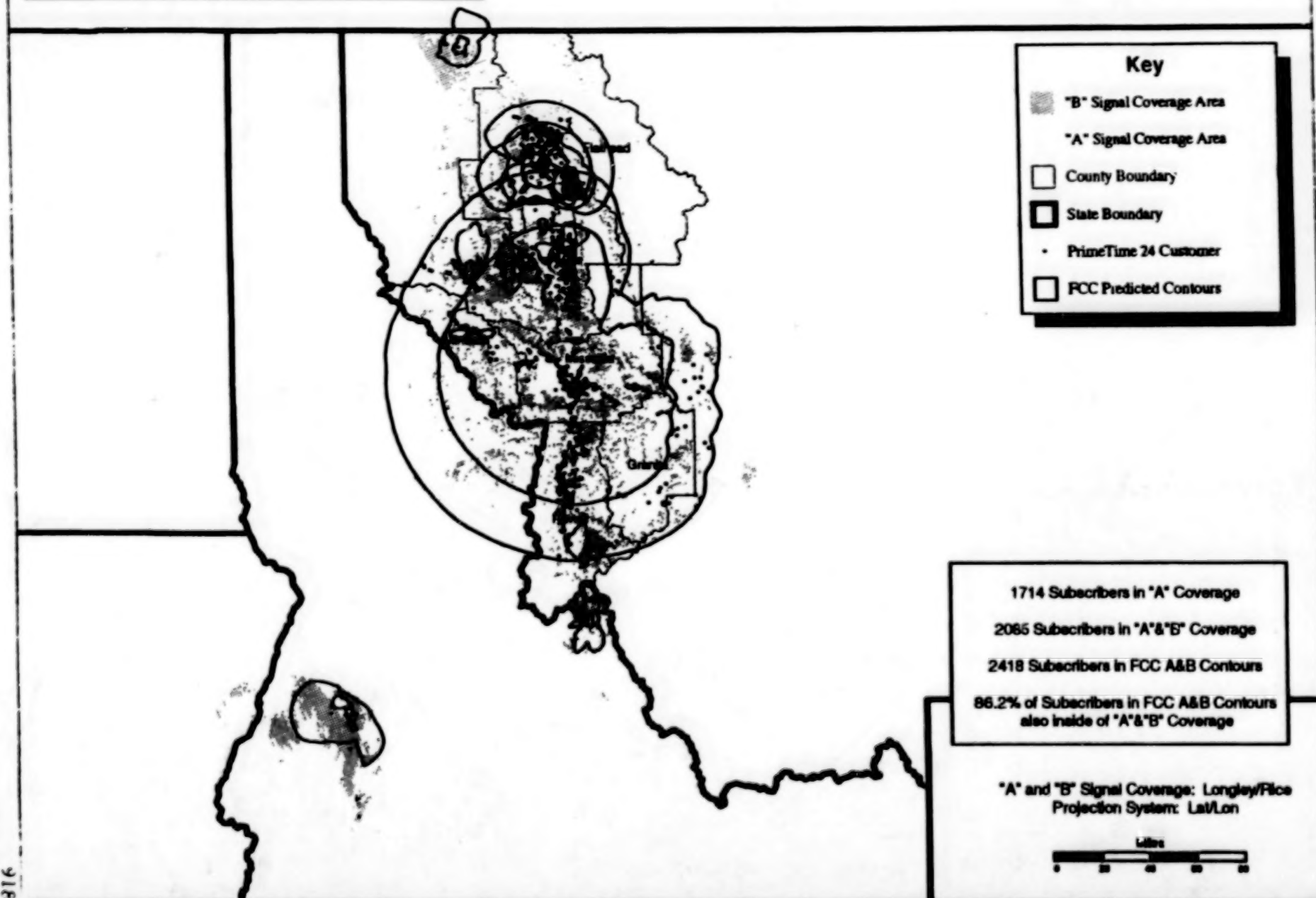
New PrimeTime 24 Subscribers through DirecTV since 1/1/96



918

KPAX: Missoula, MT
A CBS Affiliate

New PrimeTime 24 Subscribers through DirecTV since 1/1/96









WISH: Indianapolis, IN

A CBS Affiliate

New PrimeTime 24 Subscribers through DirecTV since 1/1/96

Key

-  "B" Signal Coverage Area
-  "A" Signal Coverage Area
-  State Boundary
-  County Boundary
-  PrimeTime 24 Customer
-  FCC Predicted Contours

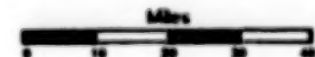
6744 Subscribers in "A" Coverage

8779 Subscribers in "A"&"B" Coverage

9140 Subscribers in FCC A&B Contours

91.7% of Subscribers in FCC A&B Contours
also inside of "A"&"B" Coverage

"A" and "B" Signal Coverage: Longley/Rice
Projection System: Lat/Lon



MEASURED FIELD INTENSITY
WFOR-TV, CHANNEL 4, MIAMI, FLORIDA

Location Number	Address	Field Intensity				
		Maximum (dBu)	Minimum (dBu)	Median (dBu)	Standard Deviation (dB)	Adjusted* (dBu)
647	13613 SW 187th St.	84.9	70.5	76.9	4.1	72.8
183	14435 SW 79th St.	72.2	64.4	69.5	1.0	68.5
247	11376 SW 73rd Ter.	78.4	71.0	75.2	0.9	74.3
95	6741 SW 105th Pl.	75.1	69.5	72.8	0.9	71.9
583	13971 SW 25th St.	78.6	71.6	76.1	1.0	75.1
479	14337 SW 51st St.	77.5	70.9	75.5	0.9	74.6
551	1994 SW 142nd St.	79.3	72.6	77.0	0.9	76.1
599	20941 SW 122nd Pl.	70.8	64.5	68.8	0.9	67.9
407	17821 SW 84th Ave.	75.2	60.8	72.0	1.3	70.7
783	17802 SW 107th Apt. 5	72.6	64.7	69.3	1.6	67.7
231	15921 SW 104th Ct.	72.4	67.3	70.7	0.7	70.0
31	11368 SW 117th Ct.	70.7	60.9	67.5	0.9	66.6
375	11047 SW 138th Pl.	73.5	69.4	72.0	0.6	71.4
23	11959 SW 75th St.	76.2	70.8	74.3	0.7	73.6
683	11222 SW 100th Ave.	75.4	70.9	74.0	0.5	73.5
799	9501 73rd Ave.	78.7	69.3	75.6	1.7	73.9
679	4203 Monserate St.	84.7	79.3	82.8	0.7	82.1
47	3247 Oak Ave.	81.6	74.2	78.8	1.4	77.4
343	2803 Coral Way	84.6	54.9	78.5	4.5	74.0
167	1529 Palermo	84.5	76.5	82.0	1.4	80.6
559	2540 SW 78th Ave.	81.5	73.5	78.8	1.4	77.4
655	2333 Brickell Ave. Apt. 1816	85.4	70.1	81.3	3.2	78.1
207	4567 Post Ave.	88.3	75.7	83.7	1.6	82.1
39	2940 NW 18th Ave.	87.9	60.8	80.1	3.8	76.3
615	3261NW 51st Ter.	88.8	81.8	87.0	1.1	85.9

* Median minus Standard Deviation

**MEASURED FIELD INTENSITY
WFOR-TV, CHANNEL 4, MIAMI, FLORIDA**

Location Number	Address	Field Intensity				
		Maximum (dBu)	Minimum (dBu)	Median (dBu)	Standard Deviation (dB)	Adjusted* (dBu)
431	2277 NW 81st Ter.	93.8	83.4	90.1	2.2	87.9
527	6995 NW 21st Ave.	93.2	87.3	90.7	1.1	89.6
175	5523 NW 21st St.	93.2	87.6	90.6	0.9	89.7
391	1232 NW 55th St.	91.2	83.5	87.6	1.8	85.8
543	944 NW 49th St.	89.4	82.9	87.0	1.2	85.8
439	535 NW 48th St.	90.0	83.2	87.7	1.6	86.1
415	5600 NE 6th Ave.	89.6	83.6	86.7	1.0	85.7
367	780 NE 69th St., Apt. 1109	95.6	84.3	91.2	2.2	89.0
399	4944 Le Jeune Rd.	95.1	62.6	89.9	8.4	81.5
311	2520 NW 36th St.	88.1	77.6	85.1	2.6	82.5
695	1852 NW 43rd St.	92.1	84.4	88.9	1.7	87.2
607	7280 McNab Road #20220	79.4	72.6	76.8	1.0	75.8
71	11162 Lakeview Dr.	80.9	74.0	77.9	1.2	76.7
567	1971 Lyons Rd. Apt. 105	81.2	73.6	79.0	1.4	77.6
63	6731 NW 61st Ave.	79.5	74.0	77.2	0.9	76.3
423	5281 NE 19th Ave.	77.0	69.1	74.3	1.3	73.0
151	2442 NE 26th St.	78.3	70.0	73.3	1.6	71.7
519	3204 NE 7th Pl. Apt. 1	82.4	62.2	76.1	4.4	71.7
239	4631 NE 3rd Ave.	84.3	77.9	82.0	40.8	81.2
215	5460 NW 38th St.	84.5	78.3	82.2	1.4	80.8
351	4561 Powerline Rd. #135	87.6	78.0	84.6	1.3	83.3
711	4561 Powerline Rd. #201	87.6	78.0	84.6	1.3	83.3
767	4631 NW 33rd Ave.	87.8	81.5	85.8	0.9	84.9
7	9793 NW 45th St.	83.5	77.7	81.4	0.9	80.5
591	10781 Lago Wellenly Dr.	88.4	75.2	84.3	2.9	81.4

* Median minus Standard Deviation

**MEASURED FIELD INTENSITY
WFOR-TV, CHANNEL 4, MIAMI, FLORIDA**

Location Number	Address	Field Intensity				
		Maximum (dBU)	Minimum (dBU)	Median (dBU)	Standard Deviation (dB)	Adjusted* (dBU)
751	2790 SW 139th Ave.	88.4	79.1	84.7	1.8	82.9
279	5100 SW 130th Ave.	73.1	66.4	71.2	0.9	70.3
287	1891 NW 162nd Ave.	92.6	88.1	90.2	1.4	88.8
359	16060 La Costa Dr.	96.4	91.0	94.7	0.9	93.8
535	2370 Poinsetta Ct.	100.7	94.9	98.6	0.9	97.7
263	2940 W. Missionwood Ct.	93.1	83.8	89.5	2.3	87.2
743	6836 SW 16th Ct.	113.3	107.8	111.4	0.9	110.5
735	2130 SW 67th Way	118.6	112.2	116.3	0.9	115.4
671	631 SW 56th Ter.	113.7	106.2	110.9	1.2	109.7
199	6032 Pierce St.	110.8	103.7	108.4	1.4	107.0
503	1001 Hillcrest St.	113.0	107.0	111.1	0.9	110.2
487	4020 Buchanan St.	101.4	94.1	98.9	1.8	97.1
303	2123 N 32nd Ct.	100.3	95.5	98.7	0.5	98.2
335	2414 Gloria Lane	113.0	109.5	111.7	0.7	111.0
87	2118 Tyler St.	97.0	89.6	92.9	1.6	91.3
271	480 NW 94th Ter. #1A	90.9	84.5	89.5	0.8	88.7
383	1145 NW 58th Ave.	90.4	84.7	88.1	0.8	87.3
15	1194 N State Rd. 7	89.6	82.6	86.5	1.1	85.4
119	875 N State Rd. 7	90.7	85.0	88.2	0.9	87.3
135	1821 SW 36th Ave. #1	95.7	90.7	94.0	0.5	93.5
687	2443 SW 42nd Ter.	95.0	89.9	92.8	0.8	92.0
143	700 SW 34th St.	92.3	85.2	89.2	1.3	87.9
471	456 NW 9th Ave.	103.3	63.6	98.2	5.3	92.9
327	3000 Riomar St. Apt. 306	85.7	62.7	80.7	3.4	77.4
223	2805 E Oakland Park Blvd.	80.7	48.8	75.1	4.1	71.0

* Median minus Standard Deviation

**MEASURED FIELD INTENSITY
WFOR-TV, CHANNEL 4, MIAMI, FLORIDA**

Location Number	Address	Field Intensity				
		Maximum (dBu)	Minimum (dBu)	Median (dBu)	Standard Deviation (dB)	Adjusted* (dBu)
791	2805 E Oakland Prk Blvd Apt 3	80.7	48.8	75.1	4.1	71.0
721	2805 E Oakland Park Blvd.	80.7	48.8	75.1	4.1	71.0
103	2736 N Andrews	84.4	75.9	81.9	1.0	80.9
511	2736 N. Andrews #141	84.4	75.9	81.9	1.0	80.9
159	555 W Oakland Park Blvd.	82.8	72.5	79.3	1.8	77.5
319	5575 NW 79th Ave.	84.0	75.0	81.5	1.3	80.2
191	2476 W 70th Pl	89.2	81.0	87.1	1.2	85.9
759	18010 NW 79th Ave.	94.6	87.4	92.3	1.3	91.0
775	3410 NW 195th Ter.	114.1	105.2	111.1	0.9	110.2
703	2941 NW 211th ST.	97.2	91.6	96.0	0.6	95.4
455	2125 NE 190th Ter.	108.8	100.6	105.7	1.2	104.5
255	479 NE 210th Circle Ter.	97.6	91.3	95.0	1.1	93.9
639	3930 NW 175th St.	110.1	102.8	107.3	1.2	106.1
79	15880 NW 37th Ct.	104.6	96.0	100.9	1.2	99.7
447	12975 NW 16th Ave. # GET	101.3	95.2	99.2	0.9	98.3
127	26580 SW 127th Ave.	67.6	61.4	64.7	1.1	63.6
575	11930 SW 187th St.	68.6	62.3	66.5	1.0	65.5
727	10659 NE 10th Ct.	94.4	89.2	92.6	0.7	91.9
55	2080 Townside Ter. #2106	96.2	66.2	88.2	0.5	87.7
295	11921 NE 12th Ave. #256	93.2	71.6	87.7	3.1	84.6
463	1855 NE 121st St Apt 16	97.0	71.3	91.7	5.0	86.7
631	13205 Coronado Ter.	95.7	82.2	89.6	2.0	87.6
111	1595 NE 135th St.	99.6	93.8	97.7	0.9	96.8
495	1645 NE 175th St.	105.5	99.6	103.8	0.8	103.0
623	4023 SW 15th St. Apt E210	83.2	77.6	81.1	0.9	80.1

* Median minus Standard Deviation

MEASURED FIELD INTENSITY
WSVN, CHANNEL 7, MIAMI, FLORIDA

Location Number	Address	Field Intensity				
		Maximum (dBu)	Minimum (dBu)	Median (dBu)	Standard Deviation (dB)	Adjusted* (dBu)
647	13613 SW 187th St.	86.4	81.2	83.8	0.6	83.2
183	14435 SW 79th St.	86.6	77.8	81.9	1.3	80.6
247	11376 SW 73rd Ter.	88.4	81.5	85.2	1.1	84.1
95	6741 SW 105th Pl.	89.6	83.0	86.5	0.9	85.6
583	13971 SW 25th St.	91.1	84.6	88.3	0.9	87.4
479	14337 SW 51st St.	82.1	72.1	78.6	1.4	77.2
551	1994 SW 142nd St.	90.8	84.0	88.0	0.9	87.1
599	20941 SW 122nd Pl.	86.5	79.8	83.3	0.8	82.5
407	17821 SW 84th Ave.	88.4	76.1	83.5	1.4	82.1
783	17802 SW 107th Apt. 5	87.5	81.1	84.9	1.2	83.7
231	15921 SW 104th Ct.	79.3	69.0	75.2	1.9	73.3
31	11368 SW 117th Ct.	85.2	79.0	82.1	1.1	81.0
375	11047 SW 138th Pl.	88.2	82.1	85.4	0.8	84.6
23	11959 SW 75th St.	89.4	82.1	86.0	0.8	85.2
683	11222 SW 100th Ave.	89.2	80.8	85.9	1.2	84.7
799	9501 73rd Ave.	91.5	84.9	88.3	0.9	87.4
679	4203 Monserate St.	93.3	85.4	89.5	1.0	88.5
47	3247 Oak Ave.	97.3	87.1	91.8	1.9	89.9
343	2803 Coral Way	94.8	87.3	91.4	0.8	90.6
167	1529 Palermo	95.4	87.5	92.1	1.4	90.7
559	2540 SW 78th Ave.	99.0	89.4	94.7	1.6	93.1
655	2333 Brickell Ave. Apt. 1816	89.0	53.9	79.8	5.7	74.1
207	4567 Post Ave.	103.6	93.0	97.7	2.0	95.7
39	2940 NW 18th Ave.	97.2	52.2	88.2	6.6	81.6
615	3261NW 51st Ter.	103.6	95.8	100.4	0.8	99.6

* Median minus Standard Deviation

**MEASURED FIELD INTENSITY
WSVN, CHANNEL 7, MIAMI, FLORIDA**

Location Number	Address	Field Intensity				
		Maximum (dBu)	Minimum (dBu)	Median (dBu)	Standard Deviation (dB)	Adjusted* (dBu)
431	2277 NW 81st Ter.	108.2	99.7	104.4	1.6	102.8
527	6995 NW 21st Ave.	102.6	95.7	99.0	0.9	98.1
175	5523 NW 21st St.	104.6	97.5	100.4	1.0	99.4
391	1232 NW 55th St.	106.5	99.2	102.8	1.0	101.8
543	944 NW 49th St.	102.9	89.5	97.8	4.4	93.4
439	535 NW 48th St.	101.0	95.4	98.9	1.0	97.9
415	5600 NE 6th Ave.	96.0	83.9	91.5	2.0	89.5
367	780 NE 69th St. Apt. 1109	104.5	97.4	100.8	1.4	99.5
399	4944 Le Jeune Rd.	76.0	51.4	67.8	4.5	63.3
311	2520 NW 36th St.	99.6	94.0	97.2	0.6	96.6
695	1852 NW 43rd St.	100.3	93.5	96.9	1.0	95.9
607	7280 McNab Road #20220	93.1	86.0	89.3	0.9	88.4
71	11162 Lakeview Dr.	90.3	83.5	87.2	0.9	86.3
567	1971 Lyons Rd. Apt. 105	91.7	84.0	88.2	1.0	87.2
63	6731 NW 61st Ave.	92.1	85.8	89.6	0.8	88.8
423	5281 NE 19th Ave.	91.5	80.7	85.8	2.0	83.8
151	2442 NE 26th St.	93.1	78.8	86.1	2.6	83.5
519	3204 NE 7th Pl. Apt. 1	94.8	51.5	85.8	6.3	79.5
239	4631 NE 3rd Ave.	96.5	90.2	93.6	0.8	92.8
215	5460 NW 38th St.	97.5	90.2	94.5	1.3	93.2
351	4561 Powerline Rd. #135	97.0	90.2	94.3	0.9	93.4
711	4561 Powerline Rd. #201	97.0	90.2	94.3	0.9	93.4
767	4631 NW 33rd Ave.	99.1	92.2	96.2	0.8	95.4
7	9793 NW 45th St.	99.0	92.1	95.5	0.9	94.6
591	10781 Lago Wellswy Dr.	97.1	81.8	91.1	3.6	87.5

* Median minus Standard Deviation

MEASURED FIELD INTENSITY
WSVN, CHANNEL 7, MIAMI, FLORIDA

Location Number	Address	Field Intensity				
		Maximum (dBu)	Minimum (dBu)	Median (dBu)	Standard Deviation (dB)	Adjusted* (dBu)
751	2790 SW 139th Ave.	91.4	75.6	85.8	2.2	83.6
279	5100 SW 130th Ave.	82.7	73.7	78.5	1.9	76.6
287	1891 NW 162nd Ave.	105.4	99.6	102.4	0.9	101.5
359	16060 La Costa Dr.	108.1	98.8	104.1	1.8	102.3
535	2370 Poinsetta Ct.	109.7	103.1	106.5	0.8	105.7
263	2940 W. Missionwood Ct.	112.5	103.1	108.5	1.4	107.1
743	6836 SW 16th Ct.	106.5	97.9	103.3	1.6	101.7
735	2130 SW 67th Way	102.5	95.3	99.2	0.9	98.3
671	631 SW 56th Ter.	115.2	106.3	111.4	1.7	109.7
199	6032 Pierce St.	117.4	110.2	113.9	1.0	112.9
503	1001 Hillcrest St.	113.3	104.6	109.4	1.4	108.0
487	4020 Buchanan St.	116.6	108.5	113.9	1.3	112.6
303	2123 N 32nd Ct.	112.0	105.8	109.3	0.7	108.6
335	2414 Gloria Lane	115.8	105.3	112.2	1.5	110.7
87	2118 Tyler St.	109.1	98.8	104.0	2.4	101.6
271	480 NW 94th Ter. #1A	98.9	90.2	94.6	0.9	93.7
383	1145 NW 58th Ave.	99.6	93.4	97.2	0.7	96.5
15	1194 N State Rd. 7	101.5	95.0	98.3	0.9	97.4
119	875 N State Rd. 7	100.8	95.0	97.4	1.1	96.3
135	1821 SW 34th Ave. #1	106.7	100.8	103.9	0.6	103.3
687	2443 SW 42nd Ter.	104.7	97.0	101.4	1.3	100.1
143	700 SW 34th St.	108.3	100.3	103.7	1.7	102.0
471	456 NW 9th Ave.	88.4	56.7	81.6	5.6	76.0
327	3000 Riomar St. Apt. 306	90.6	68.2	85.9	3.4	82.5
223	2805 E Oakland Park Blvd.	88.5	74.4	84.0	2.5	81.5

* Median minus Standard Deviation

MEASURED FIELD INTENSITY
WSVN, CHANNEL 7, MIAMI, FLORIDA

Location Number	Address	Field Intensity				
		Maximum (dBu)	Minimum (dBu)	Median (dBu)	Standard Deviation (dB)	Adjusted* (dBu)
791	2805 E Oakland Prk Blvd Apt 3	88.5	74.4	84.0	2.5	81.5
721	2805 E Oakland Park Blvd.	88.5	74.4	84.0	2.5	81.5
103	2736 N Andrews	95.8	86.4	92.2	1.7	90.5
511	2736 N. Andrews #141	95.8	86.4	91.8	1.7	90.1
159	555 W Oakland Park Blvd.	99.1	92.3	95.9	0.8	95.1
319	5575 NW 79th Ave.	93.4	81.5	88.1	0.1	88.0
191	2476 W 70th Pl	81.1	75.2	78.1	0.8	77.3
759	18010 NW 79th Ave.	100.8	93.3	96.5	1.4	95.1
775	3410 NW 195th Ter.	112.7	106.4	110.1	0.8	109.3
703	2941 NW 211th ST.	105.9	99.7	103.1	0.7	102.4
455	2125 NE 190th Ter.	115.2	108.2	111.8	0.8	111.0
255	479 NE 210th Circle Ter.	107.2	100.6	104.8	1.0	103.8
639	3930 NW 175th St.	115.5	106.5	111.6	1.3	110.3
79	15880 NW 37th Ct.	117.6	107.3	112.7	1.9	110.8
447	12975 NW 16th Ave. # GET	114.3	106.8	110.9	0.9	110.0
127	26580 SW 127th Ave.	78.0	71.5	75.7	0.8	74.9
575	11930 SW 187th St.	84.9	78.8	82.6	0.9	81.7
727	10659 NE 10th Ct.	106.1	99.9	103.4	0.8	102.6
55	2080 Townside Ter. #2106	95.8	78.3	90.1	3.7	86.4
295	11921 NE 12th Ave. #256	100.5	87.5	95.7	6.2	89.5
463	1855 NE 121st St Apt 16	91.5	72.4	78.3	1.6	76.7
631	13205 Coronado Ter.	102.9	92.8	99.5	2.1	97.4
111	1595 NE 135th St.	111.5	104.6	108.6	0.8	107.8
495	1645 NE 175th St.	112.5	105.3	109.5	0.7	108.8
623	4023 SW 15th St. Apt E210	110.2	104.6	108.1	0.9	107.2

* Median minus Standard Deviation

CUSTOMERS GET LOCAL CHANNELS FREE WITH EVERY DSS

BUILT-IN DSS LOCAL CHANNEL COMPATIBILITY IS YOUR OPPORTUNITY TO INCREASE CUSTOMER SATISFACTION (AND SALES).

Does the following sound familiar? A customer (probably the most recent one you spoke with) says, "How do I continue to get my local TV stations if I buy a DSS?" The fact is, local compatibility is still a source of confusion and concern for most consumers. Of course, you know that all they have to do is plug a modern antenna in the connection on the back of every DSS receiver, then simply push a button that's on every DSS remote control to switch between DSS channels and local channels. And, of course, you've explained this easy built-in feature to customers time and time again. Many times you see them nod with understanding, but you can see in their eyes that they're skeptical. Here's why and how to overcome it.

ANTENNA PHOBIA!

First, understand that the customer you were talking to probably has been a cable TV subscriber for a long time. And there's a good possibility that the last time they watched TV from an antenna was back when Jimmy Carter was president. Or worse, it was using the rabbit ears that came with the TV set. Needless to say, it's understandable that they'd be skeptical about going back to an old antenna for local channel reception.

THAT WAS THEN. THIS IS NOW.

What consumers don't understand is that antenna technology has improved dramatically over the years and TV stations signals are stronger than ever. Today's antennas (you probably sell

them in your store) are capable of bringing in a high quality signal for just about every urban or suburban homeowner. And it will almost always be a clearer, more stable, and more reliable signal than cable TV! This positive DSS selling point provides you with yet another opportunity to maximize customer satisfaction!

POWERFUL CHOICES.

Modern set-top antennas are a great choice for city dwellers. Many have built-in signal amplifiers and filters to capture a great signal. Others are even tunable to optimize reception. If the customer doesn't want anything on top of the TV, a state-of-the-art external antenna can be neatly hidden inside the attic or mounted atop the roof. A word of caution: antennas that use the house wiring should be avoided due to problems with interference and overall poor performance. Of course, there will be a few customers who, because of unusual circumstances or distance, simply cannot use an antenna. For these rare instances, obtaining local stations via "lifeline" cable service is appropriate. But, again, most customers can get better-than-cable local station reception with an antenna...and with an antenna they get local channels free! Remember Free TV?

DSS, THE ANTENNA, AND EVERYTHING IN BETWEEN.

A clear-as-a-bell local TV signal also depends on more than the antenna. The lead-in should always be a quality coaxial cable, not the old-style flat-wire lead. The antenna must be securely mounted (if external) and the lead-in should be

properly installed with readily-available brackets so it doesn't flop around in the wind (a common cause of ghosts and jitters). Inside walls, the antenna lead should be kept away from electrical wires to avoid picking up interference.

MAKE LOCAL TV YOUR OPPORTUNITY!

First and foremost, explain the easy way DSS owners can get their local channels with an antenna and a push of the remote button. Be sure to go in-depth with them about how much better antennas are today to make sure they clearly understand that local station reception quality is not an issue, but an opportunity with DSS! By doing so, you've eliminated any risk for the consumer while creating a sales and satisfaction opportunity for yourself.

Tell them that with an antenna, all their favorite local stations are free...there's no need to keep (or pay for) cable. To help, create a simple flyer or poster, paste on the logos of your local stations and above it write, "With DSS, all these channels are free!" Plus, make up stickers that say the same thing and place them on TV tubes and DSS dishes on display!

By solving the local TV compatibility question in your customer's mind, you'll not only increase DSS sales, you'll open up new opportunities to sell antennas! And by helping customers get the best possible local TV signal free, they're bound to give you a great reception! ■

THE DBS LOCAL STATION SOLUTION

THE FREEDOM ANTENNA
FROM MITO CORPORATION

Until now, millions of digital
satellite dish buyers
have been missing something
very important - local station
signals. With the *Freedom Antenna*
you can double your sales, double
your profits and double your customer
satisfaction by giving them:

- A Better Solution - no need for outdoor
or rabbit ear antennas,
the Freedom Antenna is
hidden from view and
offers amazing picture quality.

Until now, millions of digital
satellite dish buyers
No Hassles - the Freedom Antenna is mainte-
nance free.

- Easy Installation - simply mount
most 18" satellite dishes using the
mounting hardware.

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Over 4 Million Customers Are Waiting for

- Added Bonus - it's also an efficient
- Easy to install



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PR Newswire

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Monday, December 23, 1996

Antennas America, Inc., Announces a Breakthrough in Local Channel TV Reception for Direct Broadcast Satellite

WHEAT RIDGE, Colo., Dec. 23 /PRNewswire/ -- Antennas America, Inc. (OTC BULLETIN BOARD: ANTM) today announced the introduction of two of its latest flat conformal antennas designed to provide the Off-Air solution for Direct Satellite Systems (DSS) installations.

The FREEDOM(TM) Antenna System, is a flat UHF/VHF TV antenna that conforms to the back of the satellite dish using the dish's existing hardware. Designed to be inconspicuous, the FREEDOM(TM) antenna is an ideal solution to the problem of local program reception with the popular 18" dishes.

Antennas America, Inc. has also introduced another conformal antenna. The WALLDO(TM) Antenna System is a flat UHF/VHF TV antenna, measuring 15 1/2" x 12" x 2". This antenna is designed so that it conceals the fact that an outdoor antenna has been installed.

Using technology developed by Antennas America, both antennas are omnidirectional and work in locations where a medium gain antenna is required. The Company will market the antennas as the solution to the problem of antenna installations on rooftops where there may be limitations due to zoning codes, covenants, homeowner restrictions or where there is the need for a more aesthetically pleasing solution.

According to Antennas America CEO, Randall P. Marx, "We recognized the explosive growth of the wireless TV market and we were able to solve the primary objection using our existing patented technology. Rabbit ears and other cumbersome conventional antennas should be a thing of the past."

Antennas America, Inc., using technology developed by the Company, designs, develops and manufactures a complete line of antenna and related systems for the wireless communication industry. These products include several planar array flat antennas for indoor and outdoor use as well as conformal antennas designed for smaller applications such as radios and computer devices. The Company also provides custom antenna designs and manufacturing for Original Equipment Manufacturers (O.E.M.) and other emerging wireless communications markets.

/CONTACT: Randall P. Marx of Antennas America, Inc., 303-421-4063, rmaai@aol.com/ 17:39 EST

----- INDEX REFERENCES -----

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increase their coverage area. (3) Broadcasters in small and rural markets should have more flexibility in DTV transition schedule because of financial constraints and differing market demands.

Modems and Digital Highlighted

NCTA EXPECTING 'BIGGEST EVER' FCC CONTINGENT AT CONVENTION

All 4 FCC commissioners, NTIA Dir. Larry Irving, about 10 Capitol Hill staffers and "probably the largest contingent ever" of FCC staffers will speak at NCTA convention March 16-19 at New Orleans Convention Center, NCTA Vp Barbara York said. Assn. said preregistration is up 10% from year ago, when 30,593 attended L.A. convention, and NCTA has sold out all exhibit space, resulting in 10% increase in exhibit areas.

FCC Chmn. Hundt will speak at 8 a.m. Tues. breakfast; Comrs. Ness and Chong at opening plenary 2 p.m. Sun.; Comr. Quello at closing general session Wed. Irving will speak at international session Sun. FCC staffers include legal advisers Rudy Baca, Thomas Boasberg and Dan Gonzalez, plus John Nakahata of Office of General Counsel and Office of Engineering & Technology Chief Richard Smith, noon Tues.

Cable Bureau staffers Elizabeth Beaty, Rick Chessen, William Johnson and John Logan, noon Tues.; Common Carrier Bureau staffers Larry Atlas and Richard Metzger, plus 8th-floor staffers James Casserly and James Coltharp, noon Tues.; small systems panel with Cable Bureau staffers Meryl Icove, JoAnn Lucanik, Tom Power and John Wong, noon Tues.; FCC Bureau Chiefs session with Meredith Jones, Regina Keeney, William Kennard, Blair Levin and Robert Pepper, 3 p.m. Tues.; 8th-floor staffer session with Julius Genachowski, Marsha McBride, Suzanne Toller and Anita Walgren, 9:30 a.m. Wed.

NCTA said it will announce later which members of Congress will participate in invitation-only session noon Sun. Hill staffers include: Julian Epstein, Mitch Glazier, Andrew Levin, Justin Lilley, David Moulton, Stephanie Peters, Robert Raben and David Schooler, all 3 p.m. Mon.

Other sessions include: 5 PUC comrs. 3 p.m. Mon.; Copyright Office Senior Attorney William Roberts, noon Tues.; 5 PUC staffers, noon Tues.; cities session with John Patrone of Boston and Byron West of Denver, 9:30 a.m. Wed.; Wall St. sessions 3 p.m. Mon. and Tues.; digital sessions 3 p.m. Mon., noon Tues., 9:30 Wed.; modem panels noon and 3 p.m. Tues.

Top executives speaking include: Lifetime CEO Doug McCormick, 3:30 Sun.; TCI Pres. Leo Hindery, Continental CEO Amos Hostetter, USA Networks Chmn. Kay Koplovitz and Cox CEO James Robbins, 9:30 Mon.; modem general session 9:30 Tues. includes Discovery Chmn. John Hendricks, @Home Chmn. Thomas Jermoluk, Microsoft Senior Vp Craig Mundie, Comcast Pres. Brian Roberts; Time Warner Vice Chmn. Ted Turner, closing general session 1 p.m. Wed.

Show mgr. Daniel Dobson said exhibits will cover 18 acres and 6 blocks of walk-through convention area between registration and panel sessions. He said NCTA will use color coding, maps and computerized product locators with capability to print maps as well as shuttle buses and people movers to aid movement through convention area.

Hostetter, convention chmn. and NCTA vice chmn., told reporters Mon. that he won't move up to be NCTA chmn., as has become traditional. He said ownership of Continental by RHC wasn't factor: "I'm just not available to do it this year." Hostetter said he will nominate Robert Miron of Newhouse as chmn. Miron was chmn. in 1990.

'Stealth' Versions Planned

DBS POPULARITY REVIVES NOVEL BROADCAST ANTENNA DESIGNS

Popularity of DBS systems is sparking renaissance in RF antenna design as viewers seek alternative ways to receive local and network terrestrial telecasts. Recent TV/FM/AM antennas introduced by Day Sequerra, SLWaber and Terk Technologies use novel designs and circuitry with goal of creating high-performance discrete products that don't intrude on home decor. Impetus for business, suppliers say, is prohibition on DBS delivery of terrestrial broadcasts, and consumer reluctance to foot separate "life-line" cable bill to get local or network VHF/UHF stations.

Companies designing new antennas say that besides desiring access to off-air signals, viewers have become accustomed to high-quality picture and sound from satellite sources. Consequently, new RF antennas must perform better than conventional indoor dipole or rooftop directional antenna. Cosmetics are yet another factor: Rabbit ears add to set-top clutter while multiple rooftop masts for DBS and terrestrial antennas detract from home's curb appeal.

Citation
3/26/97 DENVERPOST
3/26/97 Denv. Post 05:10:00

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Denver Post

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Wednesday, March 26, 1997

Antennas The Hot News For Satellite TV

Denver Post
By Stephen Keating
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LAS VEGAS, Nev. - The hot news, the groundbreaking technology by which satellite TV will win millions of cable customers, is ... an antenna?

Yup. That's the buzz here at the Satellite Broadcasting and Communications Association convention, which ends Thursday.

DirectTV, which serves 2.4 million satellite customers from its uplink facility south of Denver, is pitching TV antennas as an ankle support for the industry's Achilles' heel: Though satellite companies can offer up to 200 channels, they haven't offered popular local channels due to technical and regulatory hurdles.

Enter, or more accurately, re-enter the good old antenna.

"We've got to integrate the antenna with the 18-inch satellite dish," said Eddy Hartenstein, DirectTV's president, during Tuesday's opening session. "We're testing it in certain markets."

"I think you've got a winner," said Eddie Fritz, president of the National Association of Broadcasters.

That remains to be seen.

Consumers justifiably may be confused by the choices among antenna, cable and satellite-TV service. Hartenstein said cable companies erroneously have convinced their 65 million subscribers that cable is needed for reception of broadcast channels like NBC, ABC, CBS - which remain the most widely viewed networks, in part, because they offer local newscasts.

While cable may indeed provide better reception of broadcast channels, a new breed of antennas is on display here that could fill the satellite gap.

The Freedom Antenna, made by Antennas America Inc. in Wheat Ridge, fits snugly behind an 18-inch satellite dish and requires a line attachment to the house.

"We introduced them in January and have sold 15,000" for about \$70 each, said Kevin Schoemaker, the designer.

Also exhibited in the "Antenna Farm" display was a 76-inch-long antenna from Terk that connects to the side of the house and to the satellite dish. That sells for about \$130.

"We've never had off-air antennas at the show before," marvelled Charles Hewitt, president of the SBCA.

Not everyone is convinced that combined satellite/antenna service is the way to go, even though local channels are a critical issue to resolve for satellite companies.

Charles Ergen, the president of Englewood-based EchoStar who is here this

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Week, has joined satellite forces with Rupert Murdoch in a \$1 billion deal precisely to offer local channels to much of the United States through "spot beams" sent directly to the 18-inch home dish. EchoStar has 440,000 customers.

"I think the companies underestimated just how big an issue local channels could become, said Jimmy Schaeffler, a satellite-TV analyst with the Carmel Group. "This is an industry that's still cutting its teeth."

(END) 03-26-97

05 10 EST

----- INDEX REFERENCES -----

COMPANY (TICKER): **ANTENNAS AMERICA INC.; GENERAL MOTORS CORP.; GENERAL MOTORS CORP. (CLASS H) (ANTM GM GMH)**

MARKET SECTOR: **CONSUMER CYCLICAL; TECHNOLOGY (CYC TEC)**

INDUSTRY: **AEROSPACE & DEFENSE; AUTOMOBILES; COMMUNICATIONS TECHNOLOGY; TEL (ARO AUT CMT TEL)**

PRODUCT: **DAU; DEFENSE; DSE; TELECOMMUNICATIONS; TRANSPORTATION (DAU DDE DSE DTE DTR)**

NEWS SUBJECT: **DENVER POST; HIGH-YIELD ISSUERS; LOCAL NEWS; NEW PRODUCTS AND SERVICES; WORLD EQUITY INDEX (DNVR HIY LCL PDT WEI)**

REGION: **CALIFORNIA; COLORADO; MICHIGAN; NORTH AMERICA; PACIFIC RIM; UNITED STATES; CENTRAL U.S.; WESTERN U.S. (CA CO MI NME PRM US USC USW)**

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SUGGESTED QUESTIONS FOR WITNESSES

Questions for Sid Amira

1. Is there any location in the United States to which PrimeTime 24 will not sell its package of distant network stations? If so, what are those locations?

2. Isn't it true that roughly 2/3 of all American households subscribe to cable? And isn't it true that many cable households have discarded their rooftop antennas, or failed to keep them in working order?

3. Does PrimeTime 24 determine whether a household actually has a properly functioning rooftop antenna before it will sell distant network stations to the household? If not, how can you have any confidence in a household's claims about what results they get with a rooftop antenna?

4. PrimeTime 24 promotes the use of distant network stations as a way of "time-shifting" programming, doesn't it? And it also promotes the availability of out-of-market sports programming, doesn't it? Those are not the reasons that Congress had in mind when it created the satellite carrier compulsory license, are they? And they have nothing to do with being in an "unserved household," do they?

5. If a subscriber states over the phone that he or she does not receive an "acceptable" picture, will PrimeTime 24 sign up the subscriber without any further investigation? If the subscriber is challenged, will PrimeTime 24 continue to allow the subscriber to receive distant network stations so long as the subscriber is willing to state that there is some problem with his or her over-the-air reception? What objective information does PrimeTime 24 rely on in deciding whether to provide network service to a household?

6. PrimeTime 24 has more than 2 million customers who receive network stations by satellite. How many signal intensity tests has PrimeTime 24 performed?

7. Didn't PrimeTime 24 agree to the statutory definition of "unserved household" in both 1988 and 1994? Aren't

934

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you coming back to change the rules of the game after you have failed to comply with the existing rules?

8. PrimeTime 24's monthly copyright costs for selling a package of 8 networks stations are only 48 cents. Yet you (or your distributors) sell the package for close to \$5 per month. This is a highly profitable business for PrimeTime 24 and its distributors, is it not? Does this help explain why PrimeTime 24 is so willing to take the word of its subscribers about whether they qualify as "unserved households"?

Questions for Russell Neumann

1. When subjective picture quality ratings have been conducted in other contexts, how many different people have been used to evaluate picture quality in any given case? Don't professional standards require that any subjective ratings be done by more than one person?

2. Are you aware of any context in which the FCC has required subjective picture quality assessments to be conducted in hundreds of thousands (or millions) of individual cases?

3. If Congress changed the standard for "unserved household" to a subjective picture quality standard, how many people would need to be available to evaluate the picture quality at hundreds of thousands (or millions) of satellite homes across the country? How would they be trained? How much would this cost?

4. Please tell us about all of the different locations at which you have compared signal strength and picture quality. Also, please tell us whether the locations that you selected for your Pittsburgh study were randomly selected, or if not, how they were selected.

APR 28 1997

RECEIVED

Hamilton County Telephone Co-op

P.O. Drawer "B"
Dahlgren, Illinois 62828
618/736-2211

April 25, 1997

Comment Letter

RM 97-1

No. 40

Ms. Tonya Sandros
Copyright Office
Room 403
Library of Congress
208 Second Street, SE
Washington, DC 20003

Dear Ms. Sandros

Enclosed are 15 copies of prepared comments in the Matter of the Revision of the of the Cable and Satellite Carrier Compulsory Licenses.

My name is David E. Parkhill and I earlier faxed a letter of intent to testify to Mr. William Roberts. If you or someone from your office could notify me of what day and approximate time I need to be there it would be greatly appreciated. My office phone number is 618-736-2211 and fax number is 618-736-2616.

Sincerely



David E. Parkhill, EVP/GM



Comment Letter

97-1

No. 40

Comments of Hamilton County Communications, Inc.

Before the Copyright Office

Washington, DC

GENERAL COUNSEL
OF COPYRIGHT

APR 28 1997

RECEIVED

in the Matter of Revision of the Cable and Satellite Carrier Compulsory Licenses

Docket 97-1

April 1997

Introduction

My name is David E. Parkhill, and I am the Executive Vice President/General Manager of the Hamilton County Telephone Cooperative and its subsidiary Hamilton County Communications, Inc. Hamilton County Telephone Co-op and its subsidiary are located in Dahlgren, Illinois, a town within Hamilton County.

At Hamilton County, we provide hardware and programming for both the C-Band and DSS satellite systems. On the C-Band side we provide programming to over 1,000 customers in Southern and Central Illinois. With the DSS system we serve those living within Hamilton and Jefferson Counties and we presently provide programming services to over 1,500 customers. Both Hamilton and Jefferson Counties are mainly rural areas. We started providing C-Band services in 1985 and DSS services in 1994.

Hamilton County has been a member of the National Rural Telecommunications Cooperative (NRTC) since its inception and NRTC has been our sole provider of wholesale satellite programming for both systems

The network signals and distances in air miles we have in our area are: ABC - 45 air miles, CBS - 70 air miles, and the NBC affiliate is about 75 air miles.

White Area Concerns

The networks in our area, for the most part, are out of reach of obtaining a good picture without spending close to \$1,000.00 to have a 50' tower, 12' VHF/UHF antenna, rotor, and a preamp installed. We have been trying some new antennas with preamps that tie in with the DSS systems but the broadcasting towers are too far away to pull in much of a picture. The fact that most of the people on cable systems do not have an antenna and don't wish to put this kind of money into one just to get the local networks has been our biggest blockage in being able to compete with the cable companies and the wireless cable companies.

The people in our area would be happy to watch the local networks if they were able to get them without having to spend a large amount of money. When we talk to people that are on cable about either a C-Band or DSS system and they ask about the networks, we tell them that they can't be turned on for 90 days. They think we are trying to put something over on them.

We have had to turn some people off of certain network signals because the local networks have challenged the supplier of the satellite network feeds and said these people fall in their grade A or grade B propagation pattern. The way the laws are today we can do nothing but ask the customer to contact the network and see if they will give them a waiver or shut off the network.

From all that I can find out, the counties of Hamilton and Jefferson either fall in or extend past the grade B contour of two out of the three networks in our area. To me this means a weak to very poor signal for many of my customers. In my opinion, I feel that we should be able to turn on the distant networks for our customers without any question in areas like this because the local networks do not broadcast their signal over satellite. I believe that people should be able to receive a good quality picture all of the time not just part of the time.

KFVS, from time to time, runs an ad that says if you are able to receive their signal at all that you are not qualified to receive network programming from a satellite rebroadcast. Some people have come to us with the idea that having a satellite system to receive programming is illegal after having seen the ad and not paying close attention to it.

I have had some people say they would like to get the networks from other areas so they could keep up with what is going on in the area they come from or have family in. Some say they want to see the network programming but can't because of various reasons and by having distant networks they can catch the programming at a different time. When we ask the customers if they can receive the local networks we must take them at their word that they can't if that is what they tell us.

Summary

The people in our area would like to be able to watch the local networks without having to spend a large amount of money to do so. They are willing to watch a lesser quality of picture to get the news and weather that is closer to home if they could get the balance of the network programming from a satellite system with a quality picture. People today do not like being told they can't have something that a friend has and it is all because of where they happen to live.

We know the Copyright Office is looking at making some changes concerning the areas we have mentioned. We urge the Copyright Office to drop the "White Area" rules.

Comment Letter

RM 97-1

No. 41

Before the
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

GENERAL COUNSEL
OF COPYRIGHT

APR 28 1997

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In the Matter of:

DOCKET NO.97-1

Revision Of The Cable And Satellite Carrier
Compulsory Licenses

STATEMENT OF TESTIMONY

PREAMBLE

A miracle of the mind creates, "original works." We call this creation.

The creative mind of the forefathers, enacted a beautiful and precious legal instrument, called the Constitution.

The Constitutional Provisions Respecting Copyright reads, "The Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." (United States Constitution, Article 1, Section 8)

In 1909 the Copyright Act guaranteed protection for this creation and referred to this creation as an "original works of authorship."

In 1976, there was a general revision of the Copyright Law. Exclusive Copyright protection against copyright infringement was guaranteed by the enactment of certain compulsory licenses, therein.

The idea of Compulsory Licenses is ingenious and, should be extended in perpetuity subject to periodic revision.

REASONS WHY CABLE AND SATELLITE COMPULSORY LICENSES SHOULD BE EXTENDED IN PERPETUITY, SUBJECT TO PERIODIC REVISION

1. As a copyright owner who has neither acquired copyright ownership through work made for hire, assignments, or the like but, who is the creator of the "work" and, who owns the exclusive right to his "original works of authorship," copyright protection guaranteed through the compulsory license for this exclusive right is perfect.

Specifically, cable and satellite compulsory licenses offers me and other individual copyright owners the right to monies paid in by copyright users on a statutory basis, for the use of his or her intellectual property and, the distribution of same, subject to certain statutory provisions. It also gives individual copyright owners access to information that is normally considered by private enterprises, as privileged information.

2. There is no need to go from user to user and visa versa to negotiate.

3. The benefit of the compulsory license clearly outweighs the converse. On the one hand anyone who chooses to be a cable operator or satellite carrier has access to a uniform set of rules and regulations and, on the other hand, so does the copyright owner. The compulsory license is a balanced measure and, is a forum for the meeting of the minds, i.e. the copyright owner and user, without direct contact. Their only obligation is to:-

(a) read the pages of the copyright law and, compulsory license(s) which is/are applicable to their needs.

(b) adhere to the copyright law and, compulsory license(s) requirements and,

(c) participate in proceedings which may affect their interests.

4. The compulsory licenses encourages the freedom of trade. It is the forum of the free market place.

5. The compulsory license offers a forum to resolve controversies for the distribution of royalties and for rate adjustments, in the event no voluntary agreement is made, by the dates which are set by the Copyright Office and CARP.

6. Courts cannot expedite dispute proceedings, since they are bound by their calendars. Commercial Arbitration, without the expert facilitation of those who are career personnel in the area of Copyright and Compulsory Licenses, may frustrate a just cause of action.

The Copyright Office specializes in copyright and, compulsory licensing rules, regulations and procedures and, can more efficiently maintain a continuum of commerce rather than a disruption. The CARP has the expert advice of the Copyright Office to rely on.

7. I cannot help but stress that the cable and satellite compulsory licenses should be regarded in the same light as the Copyright Act, i.e. in perpetuity, subject to periodic revisions, expansions and, amendments.

LEGISLATIVE PROPOSAL AND/OR AMENDMENTS

There are three areas, in which I will make recommendations to Congress for amendments.

(1) The Copyright Law protects against copyright infringement. However, my own personal experience has been that, that protection is at times too often, jeopardized by dismissals from a proceeding in the Copyright Office and the CARP, this occurs as a result of motions made by certain monopolies.

The copyright users, to the best of my knowledge, so far in the history of the compulsory licenses, have conformed to the requirements of the copyright law compulsory licenses. They are therefore, not liable for copyright infringement. The dismissed party from a proceeding to which he has an entitlement, is left with no recourse, in regard to suing the copyright user for copyright infringement. This effect seems to counter that of the intent of the Constitution, Congress, the Copyright Law and, specifically the compulsory licenses.

The intent of the above three legal instruments, appears to my mind as being, an attempt to guarantee, a copyright owner from copyright infringement in perpetuity, subject to renewals. Per Title 17 U.S.C. § 102, "copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."

Specifically, the Copyright Law, in regards to compulsory licenses, has granted monopolies the right to, "lump their claims together and file them jointly." It is good to provide this exemption to these monopolies. However, on the other side of the coin, the effect, as I have found out from personal experience, is that this exemption does not "protect trade and commerce against unlawful restraints and monopolies," as is the intent of the Act of Congress of July 2, 1890, better known as the Sherman Act as amended, in fact it encourages "unlawful restraints and monopolies."

The legal manipulations of these monopolies have been, a consistent concert effort to irreparably deprive parties of their entitlements, under the compulsory licenses. By actions of these monopolies the process of the compulsory licenses reduces itself to, not if you are entitled to monies under the statute, but rather, how to get the monies you are entitled to. This has been experienced, even when they have not presented any legitimate evidence to support their direct case.

My proposal therefore is, that all paragraphs of the compulsory licenses which relate to the above exemption be amended with the addition to read, "notwithstanding any provisions of the Anti-trust Laws, for the purposes of this clause any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them. may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf, provided that the effect of so doing would not be construed, in the mind of a reasonable person, as the cause of no "protect[ion] of trade and commerce against unlawful restraints and monopolies."

(2) Added to the above provision it is hereby, recommended that any agreement amongst themselves as to a settlement that is not a proportionate division of compulsory licensing fees, shall at all times include interest earned on the agreed amount. The interest so earned shall be for the period beginning from the date of the initial investment in the Treasury, by the Register of Copyrights, to the date of payment of the agreed amount, to the other party.

(3) Furthermore, the monies distributed to at least one of these monopolies with whom I had an affiliate agreement, from my personal experience, were not automatically redistributed to me, even though I proved to them my entitlement. I had to Arbitrate in order to be paid. (see on record at the Copyright Office AAA Arbitration case No. 13'143 00644 92, James Cannings /Can Can Music vs. Broadcast Music Inc. BMI, Index # 119557/94, Supreme Court of the State of New York County.) Moreover, to the best of my knowledge, they have not to date manifested to their affiliates, in any of their brochures any categories, specifically notifying them of their entitlement to monies under the various compulsory licenses. I would recommend that Congress amend the compulsory licenses to make all parties accountable to their members and affiliates in this regard. And that any disbursement of compulsory licenses fees, be made to any member or affiliate strictly on the basis of the statutory provisions which establish entitlement..

CONCLUSION

The revisiting of Congress to issues which affect the cable and satellite compulsory licenses, has also granted to me the opportunity to have Congress be aware of issues that affect all compulsory licenses. This opportunity has allowed me to state the above facts from the point of view of an individual copyright owner, who is prosecuting his claims before the Copyright Office and CARP. It is hoped that Congress will take a close look at all facts which are presented herein, as I am presenting these facts from the perspective of first hand knowledge.

I cannot help but stress again, that the cable and satellite compulsory licenses should be regarded in the same light as the Copyright Act, i.e. in perpetuity, subject to periodic revisions, expansions and, amendments. It is my hope, that Congress would take the necessary steps to guarantee this and, that it would initiate legislative amendments to all compulsory licenses as per my recommendations. I would be glad to facilitate and, can be consulted should the need arise.

Respectfully submitted,

James Cannings
James Cannings/Can Can Music

Claimant

400 2nd Avenue # 22C

New York, N.Y. 10010

(212)642-8260

Sworn before on this 26th

April, 1997

Daniel Andujar
Notary Public

DANIEL ANDREJCZUK
Notary Public, State of New York
No. 0725499
Qualified in Westchester County
Commission Expires July 25, 1998



Boone Electric Satellite Systems, Inc.

a wholly owned subsidiary of Boone Electric Cooperative

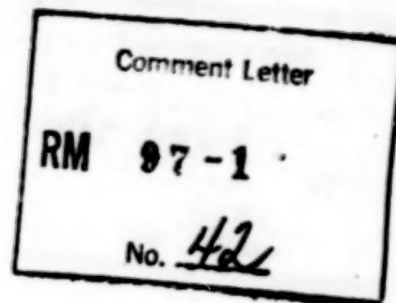
GENERAL COUNSEL
OF COPYRIGHT

APR 30 1997

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1413 Rangeline • P. O. Box 797 • Columbia, MO 65205-0797 • (573) 876-1266

April 25, 1997



Ms. Nanette Petruzzelli, Acting General Council
Copyright GC/I & R
P. O. Box 70400
Southwest Station
Washington, DC 20024

Dear Counselor:

I feel compelled to write this statement as it will echo the expressed concerns of a large part of our customer base from rural Boone County. Recently our local NBC network provider began to contest the subscriptions of persons who were subscribing to NBC affiliate(s) from another part of the country via satellite. These subscribers received letters saying their programming would be disconnected according to rights given the local station with federal legislation. This action on part of the local station has caused a flurry of activity including heated arguments with the local station, letters to congressmen, and people upset with our business even though we have no control in the matter.

Most people first express the opinion that if they are paying for a service, they should be able to watch it without interference from a local station.

The next issue raised most frequently is that reception is poor at their home so a satellite feed is the only way they can get a viewable signal for that network. When asked if they have an outside antenna about one half stated they did have one, but still get an unacceptable signal. Many of the people who don't have an outside antenna live in a subdivision that have regulations against installing the antennas.

Another often voiced concern is that they subscribe to the other network not because of network or syndicated programming but to watch the news or sports from the east or west coast.

With these objections in mind from satellite subscribers, as well as the capital risk to the local station from the lost revenue due to a challenged subscriber base, a system

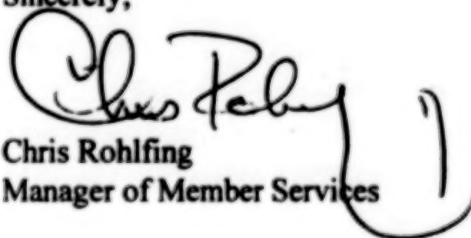
that pays a royalty to the local station generated with revenue from subscribers in a Grade A service area may be the most fair. Our customers have never complained about having to pay for network programming, the only quarrel is being forced to watch a snowy and/or ghosting station when they are willing to pay for one that is much clearer and easier to watch. Customers point out that it is their right to choose whether to buy an antenna or a satellite dish to watch the programming that pleases them. Not the network affiliates choice.

With regard to poor reception, the local NBC station has made a couple of exceptions to their decisions to contest. There are still many who have asked for exceptions that were denied. Without any criteria for what constitutes poor reception, there can be a strong signal that will still be unwatchable due to ghosting and other interference. A criteria must be set which considers more than just DB of signal strength. Somehow viewability must be considered.

Addressing the third most raised objection to the present situation will involve allowing a paying subscriber to watch non-competing programming while competing programming is being blacked-out. If the objection on part of the network affiliate is in same time programming competition, then the satellite programming competition, would likely be shut off only during prime time. This way the local news, syndicated programming and local sports could be viewed by the subscriber. This would pose no more threat to the local station than any other satellite channel.

The points raised here do not cover all aspects of the problem but do illustrate the most discussed concerns as raised by our 1600 plus subscriber base.

Sincerely,



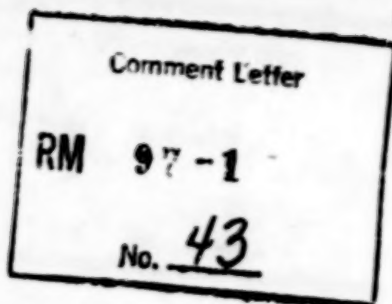
Chris Rohlfing
Manager of Member Services

S.T.S.

Satellite Television Services

a direct broadcast satellite company

April 24, 1997



GENERAL COUNSEL
OF COPYRIGHT

MAY 2 1997

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Ms. Nanette Petruzzelli, Acting General Counsel
Copyright GC/I&R
P.O. Box 70400, Southwest Station
Washington, DC 20024

Dear Ms. Petruzzelli:

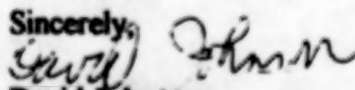
The following are my statements surrounding the "compulsory licenses" with specific regard to the "white area" rules. I respectfully request that my statements be contained in the records.

I am the general manager of Satellite Television Services, Inc. (S.T.S.), which is a subsidiary of the Clay County Rural Telephone Cooperative, Inc. S.T.S. is a DIRECTV DSS program provider in eight west central Indiana counties.

Earlier this year my office was overrun with calls from customers that had received notice from local network stations telling them their distant network service was going to be disconnected because they lived within the "white area" and were not eligible to receive the service. My customers were extremely upset and don't care about the Satellite Home Viewer Act and associated white area rules. They believe that they should be able to view whatever they are willing to pay for. Some consider it a violation of their first amendment rights.

I agree with my customers and believe that the copyright license created by the Satellite Home Viewer Act of 1988 is no longer justified. I suggest a possible solution would be a surcharge paid by consumers who elect to purchase a distant network signal, no matter where the consumer lives. I would eliminate area boundaries altogether because they are impossible to manage and administer. The surcharge could be collected and paid to the local network affiliates by the respective program providers (i.e. DIRECTV/NRTC/ECHOSTAR/ etc.). Bottom line, I would keep it simple and easy to administer.

I know that implementation details of my proposed solution are more complicated than my high level description. However, I firmly believe this is what the general public wants and deserves.

Sincerely,

David Johnson
General Manager

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